16-537

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 103.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOHN A. KNOWLES AND HOCUM HOSFORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 18, 1879.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you, between The United States of America, plaintiffs, and John A. Knowles and Hocum Hosford, both of Lowell, in said district, defendants, in an action of contract, a manifest error hath happened, to the great damage of the said United States, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-third day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

NATHAN CLIFFORD,
Associate Justice, U. S. Supreme Court.

2 Circuit court of the United States, district of Massachusetts, ss:

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this seventh day of October, A. D. .

[SEAL.] JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Thursday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

Before the honorable Thomas L. Nelson, district judge.

THE UNITED STATES OF AMERICA, PLAINTIFFS, plaintiffs in error,
v.
JOHN A. KNOWLES AND HOCUM HOSFORD, both of Lowell, in said district of Massachusetts, defendants, defendants in error.

4 The writ of error to the district court of the United States for the district of Massachusetts in this cause is dated March 25, 1879, and is made returnable at the present May term of this circuit court, A. D. 1879, the certificate to the return of said district court upon said writ of error being dated March 28, 1879. This cause is duly entered in this circuit court at this present May term, A. D. 1879, when and where the said United States of America, plaintiffs in error, appear by their attorney, the honorable George P. Sanger, and the said John A. Knowles and Hocum Hosford, defendants in error, appear by their attorney, John H. George, esquire, and the writ of error to the district court in this cause, with the return of said district court thereon, and the transcript of record of said district court thereto annexed, is filed, said transcript of record of said district court being in the words and figures following:

5 *Transcript of record of district court.—Annexed to and returned with writ of error dated March* 25, 1879, *and returnable at the May term of the circuit court, A. D.* 1879, *the certificate to the return of the district being dated March* 28, 1879.

UNITED STATES OF AMERICA,
Massachusetts District, ss:

At the district court of the United States, begun and holden at Boston, within and for the district of Massachusetts, on the third Tuesday (being the eighteenth day) of March, in the year of our Lord one thousand eight hundred and seventy-nine.

Before the honorable Thomas L. Nelson, judge.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
v.
NATHAN D. A. SAWYER, JOHN A. KNOWLES, and Hocum Hosford, all of Lowell, in the district of Massachusetts, defendants, in an action of contract.

And the plaintiffs say that heretofore, to wit, on the fourteenth day of October, A. D. 1865, the said defendant Nathan D. A. Sawyer, as
6 principal, and the said defendants John A. Knowles and Hocum Hosford, as sureties, executed to the plaintiffs a bond, a copy whereof is hereto annexed, marked A, in the penal sum of $5,000, conditioned that the said Sawyer should carefully discharge all his duties as a military storekeeper in the Quartermaster's Department, in the service of the said United States, and faithfully expend all public money, and honestly account for the same, and for all public property which should come to his hands in said capacity of military storekeeper.

And the plaintiffs say that the said Nathan D. A. Sawyer, at and about said fourteenth day of October, was a military storekeeper in the Quartermaster's Department, in the service of the said United States,

and so contined to a certain date thereafter, to wit, the first day of January, A. D. 1870, and during said time such bond was his official bond as such military storekeeper, and while said bond was in force, as such official bond, said Sawyer did not carefully discharge all his duties as such military storekeeper, as required by the condition of said bond, and did not honestly account for the same, but as such military storekeeper did receive and have in his possession certain money and property belonging to the said United States, which it was his duty, as such military storekeeper, to pay over and account for to the said United States, of great value, to wit, of the value of $5,000. Yet, though often requested so to do, said Sawyer has refused and neglected to pay over or account to the said United States for any part of said property or money, and has in all respects broken the condition of said bond, and the defendants owe the said plaintiffs the said sum of $5,000 and interest thereon, to the damage of the said United States (as they say) the sum of $10,000.

(Copy.)

A.

Know all men by these presents: That we, Nathan D. A. Sawyer, as principal, and John A. Knowles and Hocum Hosford, as sureties, all of Lowell, in the county of Middlesex, and commonwealth of Massachusetts, are held and firmly bound unto the United States of America in the sum of five thousand dollars, lawful money of the United States, to be paid to the said United States, for which payment well and
7 truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, for and in the whole, jointly and severally, firmly by these presents.

Sealed with our seals, dated the fourteenth day of *our* October, in the year of our Lord one thousand eight hundred and sixty-five.

The condition of this obligation is such that, whereas the above bounden Nathan D. A. Sawyer has been appointed military storekeeper in the Quartermaster's Department in the service of the United States, and has accepted said appointment: Now, if the said Nathan D. A. Sawyer, shall and do at all times henceforth, and during his holding and remaining in said office carefully discharge the duties thereof, and faithfully expend all public money, and honestly account for the same, and for all public property which shall or may come into his hands in said capacity of military storekeeper, without fraud or delay, then the above obligation to be void; otherwise to remain in full force and virtue.

(Signed) N. D. A. SAWYER. [SEAL.]
JOHN A. KNOWLES. [SEAL.]
HOCUM HOSFORD. [SEAL.]

Signed and delivered in the presence of us:
(Signed) A. P. BONNEY.
J. BIGELOW.

[I. R. stamp, one dollar.]

This action was entered at the March term of this court, A. D. 1876, and the following is the marshal's return therein, viz:

UNITED STATES OF AMERICA,
Massachusetts District, ss:

BOSTON AND LOWELL, *4th March*, 1876.

Pursuant hereunto, I have this day attached a chip as the property of the within-named defendants, and afterwards, on the same day, I gave in hand to each of the within-named Hocum Hosford and John A. Knowles a summons of this writ for his appearance at court, as within directed. I have made diligent search for the within-named Nathan D. A. Sawyer, but have not found him within my district.

ROLAND G. USHER,
U. S. Marshal.

8 From said March term, A. D. 1876, this action was continued from term to term to the September term of this court, A. D. 1878, when on the twenty-second day of November, A. D. 1878, the following answer of defendants was filed in court, viz:

United States district court, district of Massachusetts, ss:

UNITED STATES
v.
N. D. A. SAWYER ET AL.

And now defendants come, and for answer deny each and every allegation contained in plaintiffs' writ and declaration.

By their attorneys, JOHN H. GEORGE AND
G. F. RICHARDSON.

On the twenty-second day of November, A. D. 1878, the following agreement for trial and as to evidence was filed in court, viz:

District court of the United States, district of Massachusetts, ss:
Sept. term, 1878, to wit, Nov. 13, 1878.

UNITED STATES
v.
NATHAN D. A. SAWYER AND OTHERS.

It is agreed that the above case may be heard and the facts found by Judge Lowell sitting without a jury, and that the testimony of the witnesses before the court-martial convened in October, 1872, at San Antonio, Texas, for the trial of the above-named Nathan D. A. Sawyer, as given in the official copy of the record of said court-martial, to be produced in court at the said trial, may be used as evidence in the trial of the cause by either party and by the court, and also the address of the said Sawyer to the said court-martial, as contained in the said copy of the record, and the findings of the said court may be likewise used in evidence in the said trial in the same manner.

THE UNITED STATES OF AMERICA, *Plaintiff*,
By GEORGE P. SANGER,
U. S. Attorney, its Attorney.
HOCUM HOSFORD, AND
JOHN A. KNOWLES.

The two of said Defendants upon whom service was made,
By JOHN H. GEORGE,
GEORGE F. RICHARDSON.

9 From said September term, A. D. 1878, this action was continued to the December term of this court, A. D. 1878, when, upon a full hearing of said cause, the court found, on the second day of January, A. D. 1879, that there was due the said plaintiffs from said defendants, Knowles and Hosford, the sum of $4,336.43, with interest, and ruled, as a matter of law, that interest thereon could only be recovered from the date of the writ.

To which finding and ruling of the court the plaintiffs excepted.

From said December term, A. D. 1878, this action was continued to this present term, and on this twenty-second day of March, A. D. 1879, the following exceptions are filed and allowed by consent as of Jan. 2, 1879, viz:

UNITED STATES OF AMERICA,
Massachusetts District, ss:

U. S. district court, Dec. 7, 1878.

UNITED STATES
v.
NATHAN D. A. SAWYER ET AL.

Plaintiffs' exceptions.

This was an action of contract on the official bond of said Sawyer, as military storekeeper in the Army of the United States, dated 15th October, 1865, in the penal sum of $5,000. Said bond was joint and several. Service was had only upon the sureties. The condition of the bond was as follows: "That whereas the above-bounden Nathan D. A. Sawyer has been appointed military storekeeper in the Quartermaster's Department in the service of the United States, and has accepted said appointment; now, if the said Nathan D. A. Sawyer shall and do at all times hereafter, and during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully expend all public money, and honestly account for the same, and for all public property which shall or may come into his hands, in said capacity of military storekeeper, without fraud or delay, then the above obligation to be void, otherwise to remain in full force and virtue." The writ was dated March 3, 1876, and the declaration alleged a breach of said bond, among other breaches, in that said Sawyer had not accounted for public money to the amount of $5,000, as required by the condition of said bond,
10 and that the defendants owed the United States said sum of $5,000 with interest. The answer of said sureties was a general denial.

By agreement the case was tried before Judge Lowell, sitting without a jury. Evidence was introduced to show a breach of said bond as alleged, and that the date of the last receipt of public money by said Sawyer, as such storekeeper, was June 24, 1872. The court found a breach of the bond, and that the indebtedness of Sawyer to the United States, when he retired from office, was $4,336.43. The United States claimed and requested the court to rule that these defendants were liable for said amount, with interest from said 24th of June, 1872, but the court ruled that as no previous demand had been shown, interest was due from them only from the date of the writ; and to this ruling, and the refusal to rule as requested, the United States duly excepted.

And the said United States before judgment prays that said exceptions be allowed.

THE UNITED STATES OF AMERICA,
By GEORGE P. SANGER, *U. S. Attorney.*

The foregoing exceptions are allowed by consent of parties as of the date of Jan. 2, 1879.

March 21, 1879. JOHN LOWELL,
Late District Judge.

And now, on this twenty-fourth day of March, A. D. 1879, it is considered by the court that the said United States recover against the said John A. Knowles and Hocum Hosford the sum of $5,132.16, and costs of suit taxed at .

I, Elisha Bassett, deputy clerk of the United States district court of the district of Massachusetts, hereby certify that the foregoing is a true copy of the record and proceedings in the said suit, with all things concerning the same.

In witness whereof I hereunto subscribe my name this twenty-eighth day of March, A. D. 1879.

[SEAL.] ELISHA BASSETT,
Deputy Clerk.

11 This cause, entered as aforesaid in this circuit court, is set down for hearing and fully heard before the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, holding said circuit court, and after due deliberation thereon had, no error in the record and proceedings of the district court in this cause being found, the judgment of the said district court is affirmed with interest, but without costs in this circuit court. It is considered by the court here, to wit, Sept. 23, 1879, that the said United States of America recover of the said John A. Knowles and Hocum Hosford the sum of five thousand one hundred and thirty-two dollars and sixteen cents, with costs of suit, taxed in said district court at thirty dollars and forty cents, together with one hundred and twenty-eight dollars and twenty cents interest thereon, at the rate of six per centum
12 per annum, from March 24, 1879, the date of the judgment in said district, to this date.

A true record. Attest:

JOHN G. STETSON, *Clerk.*

13 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the district of Massachusetts, within the first judicial district, certify that the foregoing is a true copy of the record of said circuit court in the cause of The United States of America, plaintiffs in error, v. John A. Knowles et al., defendants in error, lately determined in said circuit court, and of all proceedings therein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this seventh day of October, A. D. 1879, and of the Independence of the United States the one hundred and fourth.

[SEAL.] JOHN G. STETSON, *Clerk.*

14 The United States of America to John A. Knowles and Hocum Hosford, both of Lowell, in the district of Massachusetts, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Massachusetts, wherein The United States of America are plaintiffs in error and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this twenty-third day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

NATHAN CLIFFORD,
Associate Jus., Sup. Court of the U. S.

Due service of above citation is hereby acknowledged by defendants in error.

JOHN A. KNOWLES &
HOCUM HOSFORD,
By their attorney, JOHN H. GEORGE.

(Indorsement on cover:) No. 103. The United States, plaintiff in error, vs. John A. Knowles and Hocum Hosford. Massachusetts C. C. U. S. Filed 18th October, 1879.

16537

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES
vs.
KNOWLES, &c.
} No. 163.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES
vs.
KNOWLES, &c.
No. 103.

BRIEF FOR THE UNITED STATES.

This was an action against the sureties upon an official bond given by a *military storekeeper*.

It has been brought up, on behalf of the United States, to obtain a review of the judgment below upon the question, When did *interest* begin to run upon the original debt?

The bill of exceptions is given upon the fifth page of the record.

The date of the last receipt of public money by the storekeeper was June 24, 1872.

The condition of the bond was that, during his holding of his office, the storekeeper would "carefully dis-

charge the duties thereof, and faithfully expend all public money and honestly account for the same, and for all public property which shall or may come into his hands in said capacity of military storekeeper, without fraud or delay."

The court, to whom the case was submitted, found that the bond had been broken, and that the storekeeper's indebtedness to the United States when he retired from office was $4,336.43.

The United States thereupon asked the court to rule that interest began to run from the 24th of June, 1872 (as above), but the court ruled that, as no previous demand had been shown, interest was due only from the date of the suit (March 3, 1876). Whereupon the United States excepted both to the actual ruling and to the refusal to rule as requested.

For error is assigned:

1. The refusal to rule that interest ran from June 24, 1872.

2. The ruling that interest ran only from the date of the suit.

The statutes relating to the subject in dispute are:

1. That of 1862, ch. 199, sec. 1 (12 Stat., 593, reproduced Rev. Stat., sec. 3622):

> That from and after the passage of this act any officer or agent of the United States who shall receive public money which he is not authorized to retain as salary, pay, or emoluments shall render his accounts monthly, instead of quarterly as heretofore;

The rest of the statute is not pertinent to the present discussion.

2. That of 1797, ch. 20, sec. 1 (1 Stat., 512, reproduced Rev. Stat., sec. 3624):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when any revenue officer, or other person accountable for public money, shall neglect or refuse to pay into the Treasury the sum or balance reported to be due to the United States upon the adjustment of his account, it shall be the duty of the Comptroller, and he is hereby required, to institute suit for the recovery of the same, adding to the sum stated to be due on such account the commissions of the delinquent, which shall be forfeited in every instance where suit is commenced and judgment obtained thereon, and an interest of six per cent. per annum from the time of receiving the money until it shall be repaid into the Treasury.

I submit that, under the above provisions of law, the sureties are chargeable with a statutory demand by the United States at the end of at most a month from the receipt of the item found by the court below to have been received by the storekeeper; and also that upon such demand, or equally upon the demand made by the bringing of this suit, *interest began to run from the date of such receipt.*

Such was the principle of the judgment of this court in Gaussen's case (97 U. S., 584).

There the verdict and judgment below gave interest upon the balance due from a collector of customs for some thirty years, *i. e.*, from October 12, 1845, the date of the last adjustment of his accounts at the Treasury, the suit having been brought against a surety alone. As to the position of the surety, this court said (p. 500): "The defendant's testator was a surety on the bond; but that is an immaterial fact in the case, for nothing is plainer than the rule that a surety on a bond is lia-

ble to the same extent to which his principal is liable by force of the bond."

The more recent case of Curtis, (100 U. S., 119), in which it was held that interest ran only from the date at which the suit was brought, differs from the present case essentially.

The condition of the bond in that case was *special*, viz, to "refund at any time when thereto required," the facts showing that upon going out of office the paymaster had rendered an account in which he claimed credit for an item of *stolen money*. This item was disallowed upon an adjustment made after the paymaster's death, and this disallowance was notified to the sureties (the only parties sued) only by the bringing of the suit.

This court held that the date at which such suit had been begun was that at which the sureties had first been required to "refund," and, therefore, by the words of the bond, was the date at which the first default occurred.

The case was special, and the court expressly confined the effect of the decision to the very matter then before it.

S. F. PHILLIPS,
Solicitor-General.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~343.~~ 73

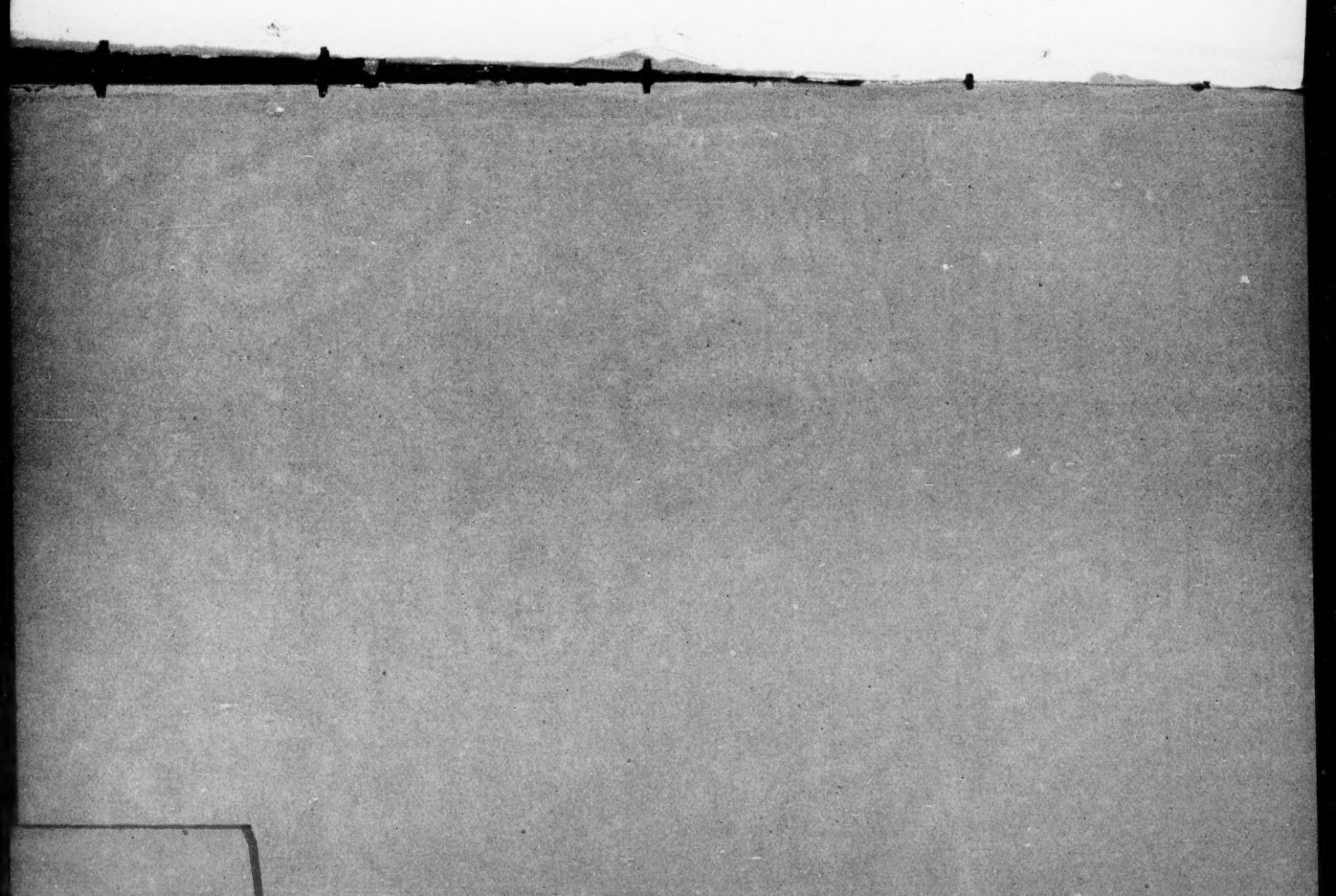
THE CITY OF DETROIT, APPELLANT,

vs.

THOMPSON DEAN, AND THE MUTUAL GAS LIGHT COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 15, 1879.



SUPREME COURT OF THE UNITED STATES.

No. 343.

THE CITY OF DETROIT, APPELLANT,

vs.

THOMPSON DEAN, AND THE MUTUAL GAS LIGHT COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

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By the Hon. Henry B. Brown, district judge, and one of the judges of the circuit court of the United States for the eastern district of Michigan. In equity.

To Thompson Dean, and the Mutual Gas Light Company of Detroit.

Whereas the city of Detroit has appealed to the Supreme Court of the United States from the decree rendered by the circuit court of the United States for the eastern district of Michigan, in equity, in the case wherein Thompson Dean is complainant and the said city of Detroit and the Mutual Gas Light Company are defendants, and has filed the security required by law:

You are therefore, hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Detroit in the eastern district of Michigan, on this 5th day of May, 1879.

HENRY B. BROWN,
District Judge and one of the Judges of said Court.

EASTERN DISTRICT OF MICHIGAN, *ss.*

Fred A. Baker, being duly sworn, deposes & says, that on the 5th day of May, 1879, he served the within citation on Meddaugh & Driggs, the solicitors for the said Thompson Dean, in said cause, by delivering a true copy thereof to E. W. Meddaugh, esq., one of said solicitors, in person, and by exhibiting to him the original; and that on the 10th day of May, 1879, he served said citation on the Mutual Gas Light Company of Detroit by delivering a true copy thereof to William H. Fitch, the president of said company, and its chief executive officer, and by exhibiting to him the original citation.

FRED A. BAKER.

Subscribed & sworn to before me, this 10th day of May, 1879, at Detroit in said district.

JNO. GROVER,
U. S. Commissioner East. Dist. Mich.

(Indorsed:) 2241. U. S. circuit east dist. Mich. Thompson Dean, compl't vs. City of Detroit & Mutual Gas Light Co., deft's. Citation. Filed May 10th, 1879. Jno. Grover, dep'y cl'k. W. C. Maybury, sol'r for def't city.

UNITED STATES OF AMERICA:

Circuit court of the United States for the eastern district of Michigan.
In equity.

To the judges of the circuit court of the United States for the eastern district of Michigan, in equity:

Thompson Dean, of the city and State of New York, and a citizen of said State, brings this his bill of complaint against the city of Detroit, a municipal corporation organized and existing under the laws of the State of Michigan, and the Mutual Gas Light Company of Detroit, the latter of which is a corporation organized under the laws of the State of Michigan, as hereinafter more particularly averred, and having its chief office within the City of Detroit, and is therefore a citizen of the State of Michigan, and complaining, says:

1. That in the month of December, of the year 1871, the said defendant, the Mutual Gas Light Company of Detroit, was duly organized as a corporation under and pursuant to the provisions of an act of the legislature of Michigan, entitled "An act to authorize the formation of gas-light companies," approved February 12th, 1855, and the acts amendatory thereof.

2. By the provisions of section eight of said act, any corporation formed under it is given power to manufacture, sell, and furnish such quantities of gas as may be required in the city, town, or village
6 where said corporation is located, for public or private buildings or for other purposes, and is given power to lay conductors for conducting gas through the streets, lanes, and squares of any city, town, or village where such corporation may be located, with the consent of the muncipal authorities of such city, town, or village, under such reasonable regulations as such city, town, or village may prescribe.

3. Said corporation was formed for the purpose of manufacturing, selling, and furnishing gas for consumption within the city of Detroit; and the promoters of said company, in anticipation of the organization thereof, and preliminary thereto, applied to the common council of the city of Detroit, some time in the month of July or August, 1871, for the consent by said city to such corporation to lay conductors for conducting gas through the streets, lanes, and squares of said city.

4. Said common council, on November 28th, 1871, granted said request by an ordinance entitled, "An ordinance to permit certain persons to lay gas-pipes, mains, conductors, and service-pipes in the streets, alleys, lanes, avenues, squares, parks, and public grounds of the city of Detroit, to establish a manufactory of, and to vend gas-light in said city," which ordinance was approved by the mayor of said city on the date last aforesaid. A copy of said ordinance is hereto attached as a part of this bill of complaint, marked Exhibit A.

5. Said Mutual Gas Light Company, after its organization as aforesaid, executed and delivered to said city of Detroit a bond, with good and sufficient securities, duly approved, in the sum of one hundred thousand dollars, with obligations and conditions pursuant to the provisions and requirements of said ordinance.

6. Very soon after its incorporation, as aforesaid, the Mutual Gas Light Company of Detroit, entered upon the construction of works for the manufacture of gas, in the township of Hamtramck, within a few hundred feet of the eastern boundary of the corporate limits of said city of Detroit; and on the 15th day of November, in the year 1872, it had completed such works, and in addition thereto had
7 laid such quantity of mains and service-pipe in the streets of said city of Detroit, as to be prepared to enter upon the work of manufacturing and vending gas to the citizens of said city; and said city was so informed by a communication from the president of said company, addressed to the chairman of the common council committee on gas-lights, which said chairman submitted to the common council of said city, at a meeting of said council, under date of December 10th, 1872.

7. Said company commenced the manufacture, distribution, and sale of gas to the residents of said city on or about the 25th day of November, 1872, and from that time hitherto has continued so to do; and during all of said period, said company, in addition to vending gas to private consumers, has, to a greater or less extent, supplied the public buildings and lamp-posts of said city of Detroit with gas, under contracts between said city and said gas company, made from time to

time; and said gas company is at the present time so supplying the lamp-posts of said city, under contracts duly and legally made between said city and said company, and bearing date the day of , 1877, which contract does not expire until the first day of July, 1878.

8. Said company, in the construction of its said works, purchase of material therefor, and in the purchase of main and service pipes, and other necessary material, consumed its capital stock, and has been compelled, in addition thereto, to create a bonded indebtedness, secured by mortgages upon its property, that with interest thereon now aggregates the sum of about six hundred and fifty thousand dollars. These bonds have been sold, and are now held by different individuals, and your orator is the holder and owner of more than one hundred thousand dollars thereof at their par value.

9. On the 14th day of December, 1877, the common council of said city of Detroit, under the pretense that said Mutual Gas Light Company did not build and complete its gas-works within said city within the time and pursuant to the provisions of the ordinance of said city of November 28th, 1871, aforesaid, and that said company had
8 violated the provisions of said ordinance in other respects, and assumed the legal right and power so to do, passed an ordinance by which it was ordained and declared as follows:

"SECTION. 1. That the consent, permission, and authority granted by the common council of the city of Detroit to the said the Mutual Gas Light Company of Detroit, to lay gas-pipes, mains, conductors, and service-pipes in any of the avenues, streets, lanes, highways, alleys, public parks, and squares throughout said city be, and the same are hereby, revoked, and from and after the approval of this ordinance, the same shall cease and be null and void.

"SEC. 2. The said Mutual Gas Light Company of Detroit is hereby declared to have forfeited to the city of Detroit all its gas-pipes, mains, conductors, and service-pipe, and all its other property situated and being within the avenues, streets, lanes, highways, alleys, public parks, and squares, within the city of Detroit; and also all its other property situated within the limits of said city, and the title to all and singular the property above described and mentioned is hereby declared to have vested in the city of Detroit.

"SEC. 3. The controller is hereby authorized and directed to take and assume possession and control of all the property mentioned and described in the next preceding section, and to notify the Mutual Gas Light Company thereof, and also to serve upon the said company a certified copy of this ordinance.

"Sec. 4. This ordinance shall take immediate effect."

Said ordinance, notwithstanding the disapproval of the mayor of said city of Detroit, was duly passed by the requisite majority of the members of the common council thereof, and is therefore now in force so far as the same can have any legal validity.

10. The pretense and claim of the common council of said city, as its legal and moral justification for the passage of said ordinance, has been and is, that said Mutual Gas Light Company has forfeited all rights acquired by it under said ordinance, approved November
9 28th, 1871. First. By reason of the failure of said company to construct its works for the manufacture of gas within the corporate limits of said city of Detroit. Second. By reason of said company's failure and neglect to comply with the resolutions passed by said council from time to time, directing it to lay mains in certain of the streets of said city of Detroit. Third. By reason of its having en-

tered into an agreement with the Detroit Gas Light Company, another corporation existing in said city, for the manufacture and sale of gas, by which said companies mutually agreed to a division of territory of said city between them for the supply and sale of gas for public and private consumption.

11. Your orator, on information and belief, denies that said Mutual Gas Light Company has in any instance neglected or refused to lay mains or conductors for supply of gas-light where application or petition has been made to it by two applicants or occupants of buildings on any streets, averaging two buildings in every two hundred feet of main pipes required to supply the same, and where the common council has ordered the usual proportion of lamp-post service in connection therewith.

He further avers the fact to be that said Mutual Gas Light Company did, within one year from the passage of said ordinance, build and complete its gas-works sufficiently extensive to enable it to manufacture gas to a reasonable amount, and that while it is true that its works for manufacturing gas were located and constructed without the city limits, as hereinbefore stated, your orator is advised and believes, and so avers: First, that the terms of said ordinance did not render it obligatory upon said company to locate its works for manufacturing gas within the corporate limits of said city; and, secondly, that if this were otherwise, the lapse of time since the location and completion of said works, the acquiescence of said city of Detroit in said location, without complaint or protest against the same, and particularly the contracts made from time to time by said city of Detroit with said gas-company for the supply of gas, as hereinbefore stated, precludes said city from now insisting that the failure of said company in this regard is a ground of forfeiture of the rights conferred upon it under said ordinance.

12. Your orator admits that on the 28th day of June, 1877, said Mutual Gas Light Company entered into a written contract with the Detroit Gas Light Company, by which, among other things, said Mutual Gas Light Company was thereafter to have the privilege of supplying the gas-consuming public of the city of Detroit, located easterly of the middle of Woodward avenue; and said Detroit Gas Light Company was to have the like privilege within said city, westerly of the middle of Woodward avenue. A copy of said agreement is hereto attached, marked Exhibit B. But your orator denies that said agreement amounts to a combination with said Detroit Gas Light Company concerning the rates to be charged, either to the city or to private consumers; and avers the fact to be that no such combination with said company, or with any other gas-light company, has been made or entered into by said Mutual Gas Light Company. Your orator is informed and believes, and so charges the fact to be, that said Mutual Gas Light Company has in all respects fully performed and complied with all the conditions, provisions, and obligations imposed upon it by said ordinance of November 28th, 1871.

13. As a further answer to the claim and pretense aforesaid, of said common council, as its reason for the passage of said ordinance of repeal, your orator is advised and believes, and so charges the truth to be, that the power of said common council in answer to the petition addressed to it, was limited to a denial thereof, or a consent, coupled with reasonable regulations respecting the manner of using the streets, lanes, and squares of said city for the purpose of laying conductors for conducting gas through the same; and therefore that any and all of

the provisions of said ordinance of November 28th, 1871, that are outside or in excess of this, are utterly nugatory and void. Of such void provisions of said last-named ordinance, your orator believes and avers are those, among others, respecting the conditions on which it is
11 made obligatory upon said Mutual Gas Light Company to lay mains and service-pipe for the supply of gas for private consumption within the streets of said city; those respecting the location by said gas-light company of its manufacturing works within said city, if said ordinance shall be construed as so requiring; and those seeking to restrain said Mutual Gas Light Company from making combination with any gas-light company concerning rates to be charged for gas to the city of Detroit, or private consumers therein.

14. Your orator is informed and believes, and so charges the fact to be, that it is claimed and insisted by and on behalf of said city of Detroit, that the effect of said ordinance of repeal is to deprive said Mutual Gas Light Company of the legal right to continue to hereafter use the streets, alleys, grounds, and public places of the city of Detroit for the supply and distribution of gas in the pipes heretofore laid and now in use by it; and also to deprive it of the right hereafter to use such streets, alleys, and public grounds for the purpose of laying additional mains or conductors for conducting gas; and your orator avers that it is the purpose and design of said city of Detroit, through its officers, and it has been authoritatively given out and threatened by and on behalf of the authorities of said city, to take possession of all the mains, pipes, and other property of said Mutual Gas Light Company within said city of Detroit, and to deprive said Mutual Gas Light Company of the future possession and use thereof; and to interfere with and prevent said Mutual Gas Light Company from continuing its business, or distributing and selling gas within said city; and unless restrained therefrom, your orator is apprehensive, and believes that said city will attempt so to do.

15. Your orator further avers that, in addition to his holding the bonds of said Mutual Gas Light Company, secured by mortgages upon its property as aforesaid, he is the owner and holder of more than two hundred thousand dollars at the par value thereof of the stock of said company; that he has requested the president and board of directors of said Mutual Gas Light Company to institute proceedings in
12 the name of said company, to restrain said city of Detroit from doing the various acts and things which said city threatened to do, as hereinbefore stated; and said president and board of directors have declined so to do.

16. In consideration of the premises, your orator prays that said Mutual Gas Light Company and said city of Detroit may respectively answer this bill of complaint, without oath, their answer under oath being hereby expressly waived that a writ of injunction may issue, in the usual form, restraining said city of Detroit, its officers, agents, attorneys, and servants from disturbing the said Mutual Gas-light Company in the possession of any of its property, and particularly from interfering or preventing the said company in its use of the streets, alleys, lanes, and public grounds of said city in all respects pursuant to the terms of the grant of power to said company contained in said ordinance of November 28th, 1871; and that your orator may have such other or further relief in the premises as shall be agreeable to equity and his just rights.

Your orator prays that a writ of subpœna may issue, addressed to

the said city of Detroit and said Mutual Gas Light Company, pursuant to the rules and practice of the court.

T. DEAN.
MEDDAUGH & DRIGGS,
Solicitors for Complainant.
A. POND,
Of Counsel.

STATE OF MICHIGAN,
County of Wayne, ss:

On this 15th day of December, A. D. 1877, before me personally appeared the above-named Thompson Dean, and made oath that he has read the above bill, subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information and belief, and as to those matters he believes it to be true.

LOUIS C. STANLEY,
Notary Public, Wayne County, Mich.

13 EXHIBIT A.

An ordnance to permit certain persons to lay gas-pipes, mains, conductors, and service-pipes in the streets, alleys, lanes, avenues, squares, parks, and public grounds of the city of Detroit, to establish a manufactory of and to vend gas-light in the said city.

Whereas, David Preston, H. Moffat, T. K. Adams, Robert Hosie, J. F. Antisdel, Ransom Curtis, H. C. Hodges, Philip Thurber, E. Kanter, J. Heffron, H. Weber, A. Wilkins, Thompson Deane, John P. Kennedy, and Wm. H. Fitch, jr., their associates and successors propose to organize as a body politic and corporate, under "An act to authorize the formation of gas-light companies," approved February 12, 1855 (Laws of 1855, page 243), and act and acts amendatory thereto, for the purpose of building and operating gas-works in the city of Detroit, the said corporation to be known as "The Mutual Gas Light Company of the city of Detroit; therefore,

It is hereby ordained by the common council of the city of Detroit:

SECTION 1. That consent, permission, and authority are hereby given, granted, and duly vested in David Preston, H. Moffat, T. K. Adams, Robert Hosie, J. F. Antisdel, Ransom Curtis, H. C. Hodges, Philip Thurber, E. Kanter, J. Heffron, H. Weber, A. Wilkins, Thompson Dean, John P. Kennedy, Wm. H. Fitch, jr., and their associates, their successors and assigns, organized into a corporation under the laws of the State of Michigan, as aforesaid, to lay gas-pipes, mains, conductors, and service-pipes in any of the avenues, streets, lanes, highways, alleys, public parks or squares, throughout said city, subject, however, at all times to any and all restrictions and regulations imposed upon "The Detroit Gas Light Company," and the following, to wit:

1. The said corporation shall do no permanent injury to any street,
14 alley, avenue, square, or park, or shade-tree, nor in any manner disturb or interfere with the water-pipe, sewer, or gas pipe, now or hereafter laid by any authorized person or corporation, but when they shall open ground in the same to lay any pipe or for any other purpose whatever, they shall forthwith restore the streets, pavements, sidewalks or ground to a condition equally as good as before, and shall promptly comply with any order or resolution of the common council, or other proper authority in reference thereto.

2. The said corporation shall open or incumber no more of any street, alley, or public ground at any one time, or in any one place, than may be strictly necessary to enable them to proceed with advantage to the work of supplying private or public demand for gas-light; nor shall any street, avenue, or alley be allowed to remain open or incumbered for a longer period than shall be necessary to execute the work for which the same shall have been opened.

3. The said corporation shall be liable to compensate the city of Detroit, and any individual owner or owners of property adjacent to the street or alley opened and injured by them, for all damages which may result from leaky-pipes, or by reason of their having opened or incumbered any street, avenue, alley, sidewalks or public grounds in said city of Detroit. Said corporation shall at all times be subject to the city ordinances now in existence, or which may hereafter be passed relative to the keeping or storing within the city limits of naphtha, petroleum or other inflammable substances, and shall also be subject to all ordinances relating to the inspection of gas, gas-meters and nuisances, and shall be subject to all other ordinances of the city.

SEC. 2. In case the said corporation, within one year from the passage of this ordinance, shall not have built and completed gas-works in this city, sufficiently extensive to enable it to manufacture gas to a reasonable amount, or if it shall at any time enter into any combination with any gas-light company concerning rates to be charged for gas, either to the city or private consumers, then the consent given by this ordinance shall cease, and this ordinance shall become null and void. And the said corporation is hereby expressly forbidden to sell its property, franchises, or privileges to any other gas-light company, under a penalty of a forfeiture to this city of its works, mains, and other property and an acceptance of this ordinance shall be deemed a consent by said corporation that the title of said property shall vest in the city at once in case of such sale.

SEC. 3. While there exists competition in the supply and sale of gas-light in the said city of Detroit, the said corporation shall have the privilege of supplying it at such rates less than charged by the Detroit Gas Light Company as may be agreed upon between it and consumers, public and private. Said corporation shall in no instance, nor under any circumstances whatever, charge either public or private consumers higher rates for the supply of light than an average of the rates charged such public and private consumers, and paid in the cities of Buffalo, Chicago, Cleveland, Toledo, and Sandusky.

SEC. 4. It is further ordained that in all streets where the said corporation has not laid mains or conductors within two years from the passage of this ordinance, upon petition of at least two applicants or occupants of buildings on such streets for a supply of gas-light, averaging two buildings in every two hundred feet of main pipe required to supply the same, the company shall, when directed by the common council, lay mains in such streets, the common council ordering therein the usual proportions of lamp-post service. And in case the company neglect to lay mains when directed by the common council, they shall be subject to the forfeiture contained in section 2.

SEC. 5. The said corporation shall supply gas-light under uniform and sufficient pressure between sunset and sunrise, and the quality of the same shall be as nearly uniform as practicable, averaging for each month not less than sixteen candles, to be determined by authorized photometrical tests.

SEC. 6. Within sixty days after the approval of this ordinance, the

said grantees shall perfect their incorporation with the full sum of five hundred thousand dollars of capital stock subscribed, and their
16 articles of association shall be filed in accordance with the law in such cases made and provided; and the said corporation so formed shall execute good and acceptable bonds to the city of Detroit, in the sum of one hundred thousand dollars, conditioned to perform the obligations imposed upon it by section 2 of this ordinance, and all other conditions imposed upon it by this ordinance.

SEC. 7. This ordinance shall take effect at the expiration of sixty days from the date of its passage.

Approved, November 28, 1871.

WM. W. WHEATON, *Mayor.*

Exhibit B is the agreement between the two gas companies set forth in Exhibit "A" of the answer of the city, commencing on page 50 of this record.

17 *Chancery subpœna.*

Circuit court of the United States of America, for the sixth circuit and eastern district of Michigan, sitting in chancery.

Subpœna.

The President of the United States of America, to the City of Detroit and the Mutual Gas Light Company of Detroit, who are citizen' of the State and resident of the eastern district of Michigan.

You are hereby commanded to be and appear in the circuit court of the United States of America, for the sixth circuit and eastern district of Michigan, sitting in chancery, before the judges thereof, at the district court-room, in the city of Detroit, on the first Monday of January next ensuing, then and there to answer unto a bill of complaint exhibited against you as defendant by Thompson Dean, of the city and State of New York, who is a citizen of the State of New York, as complainant *as complainant.* And this you shall in no wise omit, under the penalty of one thousand dollars.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this seventeenth day of December, in the year of our Lord one thousand eight hundred and seventy-seven, and of the independence of the United States the one hundred and second.

(Sig'd) ADDISON MANDELL,
Clerk.

MEMORANDUM.—The above-named defendant' are required to enter their appearance in this suit with the clerk of this court, at his office in the city of Detroit, on or before the day on which this writ of subpœna is returnable, otherwise the bill of complaint in this cause will be taken pro confesso against said defendant.

(Sig'd) ADDISON MANDELL,
Clerk.

18 EATERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return, that on the 19th day of December, A. D. 1877, I served the within writ on Wm. H. Fitch, president of the Mutual Gas Light Co. of Detroit, Alexander Lewis, mayor of the city of Detroit, defendants within-named, at Detroit, in said district, by deliv-

ering to each of them personally, true copies thereof, with like memorandum appended thereto as is hereto appended.

S. S. MATHEWS,
U. S. Marshal.
By A. S. MATTHEWS.
Deputy.

2 service, 4.00; 2 cop., 1.00; 1 miles travel, .6—Fees, $5.06.

(Indorsed:) No. 2241. Circuit court of the United States for the sixth circuit and eastern district of Michigan. In chancery. Thompson Dean, compl't, to The City of Detroit & The Mutual Gas Light Company of Detroit, def't. Subpœna. Filed Jan'y 2d, 1878. A. Mandell, cl'k. Meddaugh & Driggs, complainant's solicitor'.

19 *Affidavit of Th'n Dean.*

Circuit court of the United States for the eastern district of Michigan, in equity.

THOMPSON DEAN,
vs.
THE CITY OF DETROIT AND THE MUTUAL Gas Light Company of Detroit.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Thompson Dean, the above complainant, being duly sworn, says, that he has filed his bill of complaint in said cause, alleging, among other things, that he is largely interested in the property of the said Mutual Gas Light Company, both as a stockholder and as a bondholder; that the common council of the said city of Detroit has passed an ordinance for the purpose of revoking the authority of the said Mutual Gas Light Company, to lay gas-pipes, &c., in the streets of the said city, and declaring the property of said gas-light company forfeited to the city, and directing the comptroller of said city to take possession of the same.

The said bill prays, among other things, that *that* the said City of Detroit may be enjoined by the order of this court from interfering in any manner with the property of said company.

That the said defendant gas-light company furnishes illuminating gas to about one-half of the citizens of Detroit, manufacturing at present about four hundred thousand feet a day, and any stoppage of its works would be not only a great inconvenience to a
20 large portion of the citizens of Detroit, but would cause irreparable loss and injury to the said company and to deponent as a large owner of the stock and bonds thereof.

(Signed) T. DEAN.

Subscribed and sworn to before me this fifteenth day of December, 1877.

(Signed) LOUIS C. STANLEY.
Notary Public, Wayne County, Mich.

(Endorsed:) Filed December 15, 1877. Jno. Graves, dep'y cl'k.

21 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to

adjournment, at the district court-room, in the city of Detroit, on Saturday, the fifteenth day of December, in the year one thousand eight hundred and seventy-seven.

Present, honorable Henry B. Brown, district judge.

THOMPSON DEAN, COMPLAINANT
vs.
THE CITY OF DETROIT AND THE MUTUAL GAS LIGHT COMPANY OF DETROIT. } In equity.

Restraining order.

On reading and filing the bill of complaint in this cause, praying, among other things, that the defendant, the City of Detroit, may be restrained from interfering or preventing the said company in its use of the streets, alleys, lanes, and public grounds of said city, in all respects pursuant to the terms of the grant of power to said company, contained in an ordinance of November 28th, 1871, and enjoining the said city, its officers, attorneys, and servants from disturbing the said Mutual Gas Light Company, in the possession of any of its property.

And it appearing from the affidavit of Thompson Dean, now filed in this cause, that there is danger of irreparable injury from delay,
22 on motion of Meddaugh & Driggs, solicitors for complainant, it is ordered that on notice of a motion for injunction upon said bill of complaint, being given pursuant to the rules and practice of this court, the said City of Detroit, its officers, agents, attorneys, and servants be, and the same are hereby, restrained from disturbing the said Mutual Gas Light Company in the possession of any of its property, and from interfering or preventing the said company in its use of the streets, &c., of said city in accordance with the grant of power to said company, contained in said ordinance of November 28th, 1871.

(Sign.) HENRY B. BBOWN,
District Judge.

THE UNITED STATES OF AMERICA.
Eastern District of Michigan, ss:

I, Addison Mandell, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify that the above and foregoing is a true copy of the restraining order entered upon the journal of the proceedings of said court, in the cause therein entitled. That I have compared the same with the original entry of said restraining order, and it is a true transcript therefrom, and of the whole thereof.

Witness my official signature, and the seal of said court, at Detroit, in said district, this fifteenth day of December, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and second.

(Endorsed:) Filed December 15, 1877. (Sig') Jno. Graves, dep'y clerk.

23 *Proof of service of injunction.*

STATE OF MICHIGAN,
County of Wayne, ss:

Louis C. Hawley, being duly sworn, deposes and says that on the 14th day of January, A. D. 1878, he served the annexed injunction upon H. P. Bridge, controller of the city of Detroit, by delivering to him at

his office, in the city hall in Detroit, a true copy thereof, at the same exhibiting to him this original, and showing him the seal and signature thereon, and informing him of the nature of its contents.

(Sig.) LOUIS C. HAWLEY.

Subscribed & sworn to before me this 14th day of January, 1878.

(Sig.) FRANK H. CULVER,
Notary Public, Wayne Co., Mich.

Injunction.

Circuit court of the United States for the sixth circuit, and eastern district of Michigan. In chancery sitting.

The President of the United States of America, to the City of Detroit, its officers, agents, attorneys, and servants, and each and every of them, greeting:

Whereas, it has been represented in the circuit court of the United States for the sixth circuit and eastern district of Michigan, in
24 chancery, on the part of Thompson Dean, complainant, that he has lately exhibited his bill of complaint against you, the said City of Detroit, and against the Mutual Gas Light Company of Detroit, defendants, to be relieved touching the matters therein complained of, in which bill it is stated among other things, that you are seeking to injure the complainant touching the matters set forth in said bill, and that your actings and doings in the premises are contrary to equity and good conscience. In consideration thereof, you, the said City of Detroit, and the persons before named, and each and every of you, are commanded, under the penalty of ten thousand dollars, to be levied upon you, and such of your goods and chattels, to the use of said complainant, to desist and refrain from disturbing in any way the Mutual Gas Light Company in the possession of any of its property, and particularly from interfering or preventing the said company in its use of the streets, alleys, lanes, and public grounds of said city, in all respects pursuant to the terms of the grant of power to said company, contained in the ordinance of said city, of November 28th, 1871, a copy of which is attached to said bill of complaint, until the further order of this court.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this fourteenth day of January, 1878, and of the Independence of the United States of America the one hundred and second.

(Sig.) ADDISON MANDELL, *Clerk.*

(Endorsed:) Filed Jan'y 15, 1878. A. Mandell, cl'k.

25 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court room, in the city of Detroit, on Monday the seventh day of January, in the year one thousand eight hundred and seventy-eight.

Present, honorable Henry B. Brown, district judge.

THOMPSON DEAN, COMPLAINANT,
vs.
THE CITY OF DETROIT AND THE MUTUAL GAS LIGHT COMPANY OF DETROIT, defendants. } 2241. In equity.

By consent ordered that the restraining order heretofore issued in this

cause remain in force one week from this day, and until the further order of this court.

26 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court-room in the city of Detroit, on Monday, the fourteenth day of January, in the year one thousand eight hundred and seventy-eight.

Present, honorable Henry B. Brown, district judge.

THOMPSON DEAN, COMPLAINANT,
vs.
THE CITY OF DETROIT AND THE MUTUAL GAS LIGHT COMPANY of Detroit, defendants. } 2241. In equity.

The motion of complainant for an injunction against the City of Detroit, having been duly considered, it is ordered that an injunction issue in this cause, according to the prayer of complainant's bill to stand until the further order of the court.

27 *Pleas & answers.*

UNITED STATES OF AMERICA.

In the circuit court of the United States for the eastern district of Michigan. In equity.

THOMPSON DEAN, COMPLAINANT,
vs.
THE CITY OF NEW YORK AND THE MUTUAL GAS LIGHT COMP'Y of Detroit, defendants.

The pleas of the City of Detroit, one of the above-named defendants, to a part, and the answer of the same defendant to the residue of the bill of complaint of Thompson Dean, the above-named complainant:

This defendant by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged. First. To so much of said bill as alleges and sets
28 forth that the said complainant, Thompson Dean, is the owner and holder of more than two hundred thousand dollars, at the par value thereof, of the stock of the said defendant, the Mutual Gas Light Company of Detroit, and that he has requested the president and board of directors of said Mutual Gas Light Company to institute proceedings in the name of said company to restrain this defendant, the City of Detroit, from doing the various acts and things which the said city threatened to do, as stated and set forth in said bill, and that said president and board of directors have declined so to do; and to so much of said bill as sets forth the right of the complainant as a stockholder in the said corporation defendant, the Mutual Gas Light Company of Detroit, to maintain the said bill of complaint, and prays relief against this defendant in behalf of said complainant, as such stockholder, doth thereunto plead, and for plea saith:

That the president of said company is William H. Fitch, jr., of the city

of Detroit, in the State of Michigan, and that the board of directors of said company consist of the said William H. Fitch, jr., the said complainant, Thompson Dean, and Elijah W. Meddaugh, one of the solicitors in this cause for the said complainant, and who resides in the city of Detroit aforesaid; and that the said complainant, Thompson Dean, has never requested the president and board of directors of the said Mutual Gas Light Company of the city of Detroit to institute proceedings in the name of said company, to restrain this defendant, the said City of Detroit, from doing the various acts and things which said city threatened to do, as stated and alleged in said bill, and that the president and board of directors of said company have never declined so to do. And this defendant avers that if the said board of directors have gone through the form of passing and adopting any motion, resolution, or other proceeding, or have made any record by which they refused to institute proceedings to restrain this defendant as aforesaid, the same was so passed, adopted, or made, with the consent, procurement, and connivance of the said complainant, Thompson Dean, and the same was a
mere form or device, planned and contrived by the said complainant
29 and the other directors of said company, for the sole and only purpose of conferring jurisdiction on this court, by enabling the complainant, Thompson Dean, as a citizen of the State of New York, to file the said bill of complaint in this court, and that in truth and in fact the said bill of complaint has been filed by and in the name of said Thompson Dean, with the consent of the entire board of directors of said company, and at their special instigation and request, and that the said bill of complaint is not the bill of said Thompson Dean, but is the bill of the said company.

And this defendant avers that the said complainant, as such stockholder, has no right to institute this or any other suit against this defendant, in respect to the various acts and things which this defendant threatened to do, as stated and alleged in said bill of complaint.

All of which matters and things this defendant avers to be true, and pleads the same to so much of said bill as is hereby pleaded to, and prays judgment of this honorable court whether it ought to be compelled to make any other or further answer thereunto, and that it may be dismissed, with its costs.

And, second, to so much of said bill as alleges and sets forth that the said Mutual Gas Light Company of Detroit, in the construction of its gas-works, as set forth in said bill, and in the purchase of material therefor, and in the purchase of main and service pipe, and other necessary material, consumed its capital stock, and has been compelled, in addition thereto, to create a bonded indebtedness secured by mortgage upon its property, that, with interest thereon, now aggregates the sum of six hundred and fifty thousand dollars, and that these bonds have been sold and are now held by different individuals, and that the said complainant, Thompson Dean, is the holder and owner of more than one hundred thousand dollars thereof, at their par value; and to so much of said bill as sets forth the right of the complainant as a holder of the mortgaged bonds of said company to maintain the said bill of complaint, and prays relief against this defendant in behalf of said complainant, as such bondholder, doth thereunto plead, and for plea saith:
30 That the mortgage bonds owned and held by the said complainant, Thompson Dean, are secured by mortgages upon the property of the said company, or some portion of it, which mortgages were executed by said company to certain trustees as mortgagees, who hold said mortgages for the benefit of all the bondholders; and that

the said complainant, Thompson Dean, is not a mortgagee of any of the property of said company, but is a mere bondholder; and that the said trustees have not been requested by the said Thompson Dean, the complainant, and they have not refused or neglected on such request or otherwise to institute proceedings in the name of such trustees to restrain this defendant, the City of Detroit, from doing the various acts and things which this defendant threatened to do, as set forth and alleged in said bill.

And this defendant avers that the said complainant, as such bondholder, has no right to institute this or any other suit against this defendant in respect to the various acts and things which this defendant threatened to do, as stated and alleged in said bill of complaint.

All of which matters and things this defendant avers to be true, and pleads the same to so much of said bill as is hereby pleaded to, and prays judgment of this honorable court whether it ought to be compelled to make any other or further answer thereto, and that it may be dismissed, with its costs.

GEO. C. LANGDON,
Mayor of the City of Detroit.

W. C. MAYBURY,
Solicitor for the Defendant, City of Detroit.

F. A. BAKER,
E. F. CONELY,
Of Counsel.

[SEAL OF THE CITY.] Attest: LOUIS DILLMAN,
City Clerk.

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

On the 24th day of January, 1878, before me, at Detroit, in said district, personally appeared the above-named George C. Langdon,
31 and made oath that he is the mayor of the city of Detroit above named, and makes this affidavit in behalf of the said city; that the seal affixed to the foregoing pleas is the corporate seal of said city, and is attested under the hand of the city clerk of said city; that he has read said pleas under the seal of said city made, and knows the contents thereof, and that the same is true in point of fact, as he is informed and verily believes.

JNO. GRAVES,
United States Circuit Court Commissioner,
Eastern District of Michigan.

We, F. A. Baker and Edwin F. Conely, do hereby certify that we are of counsel in this cause for the above named defendant, the City of Detroit; that we have examined the foregoing pleas, by said defendant pleaded, to so much of the bill of complaint in this cause as is covered by the said pleas, and that in our opinion said pleas are well founded in point of law.

F. A. BAKER,
E. F. CONELY,
Of Counsel for the Defendant, the City of Detroit.

And this defendant, not waiving its said pleas, but insisting and relying thereon, for answer to such parts of said bill as are excepted,

this defendant says that it admits that the complainant is a citizen of the State ot New York; that this defendant is a municipal corporation organized and existing under the laws of the State of Michigan, and that the Mutual Gas Light Company of Detroit is a private corporation organized under the laws of the State of Michigan; and this defendant, further answering, says:

1. That this defendant admits the organization of the said Mutual Gas Light Company of Detroit, as stated in the first paragraph of said bill.

2. This defendant admits the second paragraph of said bill, and further says that the following is a true copy of said section 8, viz:

SECTION 8. Any corporation formed under this act shall have full power to manufacture and sell and to furnish such quanti-
32 ties of gas as may be required in the city, town, or village where said corporation is located, for public or private buildings, or for other purposes. And such corporation shall have power to lay conductors for conducting gas through the streets, lands, or squares of any city, town, or village where said corporation is located, with the consent of the municipal authorities of said city, town, or village, under such reasonable regulations as they may prescribe, and to make all ordinances and by-laws necessary and proper to carry into effect the foregoing powers.

And this defendant, further answering, says that by section 1 of said act such corporations are authorized to make, from time to time, such by-laws, not inconsistent with the laws and constitution of this State, as a majority of the stockholders may direct at any regular meeting.

3. This defendant admits the third paragraph of said bill, and, further answering, says that the said Mutual Gas Light Company of Detroit is located in said city, and that the promoters of said company, in anticipation of the organization thereof and preliminary thereto, not only applied to the common council of said city for the consent by said city to such corporation to lay conductors for conducting gas through the streets and lands and squares of said city; but also urged said application upon the common council, and advanced to said common council, as the principal reason why such consent should be granted, the fact that at the time such application was made, and for many years prior thereto, there was only one company, to wit, the Detroit Gas Light Company, engaged in the business of manufacturing and selling gas-light in said City of Detroit, and that by reason of the fact that said Detroit Gas Light Company had not been opposed by any competing company it had been enabled to charge the said City of Detroit and the inhabitants thereof exorbitant prices for gas-light, and much in excess of the reasonable worth of such gas-light; and this defendant avers that prior to the year 1871, the only company or person engaged in said business in the city of Detroit was the said Detroit Gas Light Company, which had been incorporated by special act of
33 the legislature of the State of Michigan, before the adoption by said State of its present constitution. Said special act of incorporation was approved March 14th, 1849, and is entitled, "An act to incorporate the City of Detroit Gas Company."

And this defendant further avers that among the promoters of said Mutual Gas Light Company and applicants as aforesaid to the common council of the city of Detroit, were Thompson Dean, the complainant, and John P. Kennedy, of New York, and William H. Fitch, jr., of Detroit, who are the principal stockholders in said company, and that the said Dean, Kennedy, and Fifth, and their associates stated and repre-

sented to the common council of the city of Detroit that they wished to organize a company to manufacture and sell gas-light in said city, and to obtain from the city its consent to use the streets for the purpose of competing in said business with the Detroit Gas Light Company, and by such competition to enable such city and the inhabitants thereof to procure gas-light at reasonable prices. This defendant, further answering, says, that the application made by the said complainant and his associates for permission to use the streets of the city as aforesaid, was so made on the 15th day of September, 1871, and that in said application said complainant and his associates, among other things, pledged themselves to build gas works within one year, to furnish gas at lower rates than the said Detroit Gas Light Company, to supply a very superior gas-light, and to be restricted in price in case there was no competition to govern it, to the average of prices charged in other cities on the lakes, and to comply with such other regulations and restrictions as might be agreed upon.

4. This defendant admits and avers that the common council of the city of Detroit did pass an ordinance as stated in the fourth paragraph of said bill, and that the exhibit annexed to said bill and marked A, is a true copy of said ordinance; and this defendant, further answering, says that the common council passed said ordinance for the following reasons:

First. Because at the time of the passage of said ordinance, and
34 for many years prior thereto, there had only been one company, to wit, the Detroit Gas Light Company, engaged in the business of manufacturing and selling gas-light in said city. Second. Because said Detroit Gas Light Company at that time, and for a long time prior thereto, charged exorbitant and unreasonable prices for gas-light. Third. Because the said common council relied upon the representations and inducements of the Mutual Gas Light Company of Detroit, as set forth in the third paragraph of this answer, and especially upon the representations and statements of said Dean, Kennedy, and Fitch. Fourth. Because the said common council believed that it had full power and authority to impose the terms and conditions contained in sections two, four, and six of said ordinance.

And this defendant avers that the said reasons were and are true in point of fact.

And this defendant, further answering, says that it has been informed and believes and charges the truth to be that the said ordinance of Nov. 28th, 1871, was originally drawn and prepared by said William H. Fitch, jr., and his associates, and that they fully assented thereto, and to every provision thereof, at the time of its passage by the common council, and that they did not inform the said common council by word or deed that they did not consider said ordinance in all respects valid and binding, or that they did not intend to comply in good faith with all the provisions of said ordinance according to the letter and spirit thereof.

5. This defendant admits the fifth paragraph of said bill, and avers that a true copy of said bond is set forth in the preamble of the ordinance annexed to this answer, and marked Exhibit A, and hereinafter more particularly mentioned.

6. This defendant admits the sixth paragraph of said bill.

7. This defendant admits the seventh paragraph of said bill, but, further answering, says that the contract between this defendant and the Mutual Gas Light Company of Detroit, under which said company is now supplying the lamp-posts of said city, or a portion thereof, with

gas-light, and which contract does not expire until July 1st, 1878
35 was made and entered into by the parties thereto, on the 14th day of August, 1877, and before this defendant had any knowledge that the said Mutual Gas Light Company had entered into the combinations and agreements with the Detroit Gas Light Company hereinafter mentioned.

And this defendant, further answering, says that its charter or act of incorporation provides that no contract for any work to be done, or for purchasing or furnishing any material, printing, or supplies for said city, if the expense of such work, material, or supplies shall exceed two hundred dollars, shall be let or entered into except to and with the lowest responsible bidder, with adequate security, and not until advertised proposals and specifications therefor shall have been duly published in at least one daily newspaper published in said city, and for such period as the common council of said city shall prescribe.

And this defendant, further answering, says that after the organization of said Mutual Gas Light Company, it proceeded to lay gas-pipes and to furnish gas-light throughout said city, and as well upon streets already occupied by the Detroit Gas Light Company as upon streets not occupied by it, and also proceeded to compete with the said Detroit Gas Light Company in said business, and by lowering prices and maintaining the quality of the gas it furnished, it succeeded in receiving the patronage of a large number of the people of the city, and of the city itself, and so continued to conduct itself until it entered into the combinations and agreements hereinafter mentioned.

8. The eighth paragraph of said bill is covered by the plea of this defendant thereto, hereinbefore pleaded.

9. This defendant, in answer to the ninth paragraph of said bill, admits that on the 14th day of December, 1877, the common council of said city passed an ordinance, as stated in said paragraph, and a true copy of said ordinance and of the preamble thereto is hereto annexed, and marked Exhibit A. And this defendant avers that all the allegations and averments set forth in the preamble to said ordinance are true in substance and in fact. This defendant further avers that
36 the said ordinance of December 14th, 1877, is legal and binding upon said company, and that the same is in full force and effect, and for a more full and particular statement of the facts upon which the said ordinance of December 14th, 1877, is founded and based, this defendant, further answering, says:

First. That said Mutual Gas Light Company of Detroit did not, within one year after the passage of the ordinance of November 28th, 1871, nor at any other time, build and complete gas-works within the limits of said city sufficiently extensive to enable it to manufacture gas to a reasonable amount; but did, in violation of said ordinance, build its gas-works without the limits of said city and in the adjoining township of Hamtramck.

Second. That heretofore, to wit, on the 28th day of June, 1877, the said Mutual Gas Light Company did, contrary to the provisions of said ordinance, enter into a combination with the said Detroit Gas Light Company concerning rates to be charged for gas to the City of Detroit and to private consumers; in that the said companies, on the day and year last aforesaid, did mutually and corruptly agree between themselves that from and after said date they would each charge private consumers of gas-light in said city the sum of two dollars and fifty cents per thousand cubic feet of gas, payable in monthly bills, at the

expiration of each calendar month, less twenty-five cents per thousand cubic feet, if paid at the office of the company on or before the 15th day of the following month, and with an additional charge of twenty-five cents per month to consumers using less than five hundred cubic feet of gas, and which said combination and agreement between the two companies concerning the rates to be charged for gas, has from thence hitherto been carried out and adhered to by both of said companies.

Third. That heretofore, to wit, on the 28th day of June, 1877, the said Mutual Gas Light Company did, contrary to the provisions of said ordinance, enter into a combination with the said Detroit Gas Light Company concerning rates to be charged for gas to the City of
37 Detroit and to private consumers, in that the said companies, on the day and year last aforesaid, did enter into a contract and agreement to divide said city; a copy of which contract is set forth in the preamble to said ordinance of December 14th, 1877, said contract being the same as the exhibit annexed to the bill of complaint in this cause, and marked "B," and which contract has been fully carried out and performed by the parties thereto.

Fourth. That heretofore, to wit, on the 28th day of June, 1877, the said Mutual Gas Light Company, contrary to the provisions of the latter part of section two of said ordinance, did sell its property, franchises, and privileges to another gas-light company, to wit, to the said Detroit Gas Light Company; in that the said Mutual Gas Light Company, on the day and year last aforesaid, did enter into and perform the contract and agreement mentioned and referred to in the next preceding, or third subdivision of this paragraph of this answer.

Fifth. That at the expiration of two years from the passage of said ordinance of November 28th, 1871, said Mutual Gas Light Company had not laid mains or conductors in a large number of the streets of said city, and from time to time from thence hitherto the said company has been repeatedly and duly petitioned and requested by the owners or occupants of buildings on each of many of said streets for a supply of gas-light from said company, said owners or occupants in each instance representing buildings averaging two buildings in every two hundred feet of main pipe required to supply the same; and although the common council upon such petitions has directed said company to lay mains in such streets respectively, the common council at the same time ordering therein the usual proportion of lamp-post service; yet the said company has wholly neglected and refused to comply with such petitions and the directions of the common council, as aforesaid, and claims and pretends that the provisions of section four of said ordinance are not valid, and are not binding on said company. This defendant is ready and willing, before the proofs are taken in this case, to furnish the complainant a list of the particular instances,
38 giving the name of the street where the said company has refused or neglected to lay mains when directed to do so by the common council, in accordance with the provisions of section four of said ordinance.

Sixth. That heretofore, to wit, on the 28th day of June, 1877, the said Mutual Gas Light Company did violate, and from thence hitherto has continued to violate, the provisions of section four of said ordinance, in that the said Mutual Gas Light Company, on the day and year last aforesaid, did enter into and perform, and still continues to perform, the contract and agreement with the Detroit Gas Light Com-

pany, which contract or agreement is mentioned and referred to in the third subdivision of this paragraph of this answer.

10. This defendant admits that the claim of this defendant as its legal and moral justification for the passage of said ordinance of December 14th, 1877, has been, and is in part as stated in the tenth paragraph of said bill, and for a more full and complete statement of the claim and position of this defendant in the premises, it refers to the facts set forth in the next preceding or ninth paragraph of this answer, all of which averments this defendant here again alleges to be true, and submits to the court that upon said facts the common council of said city had full power and authority, at law and in equity, to pass the said ordinance, and the same did go into full force and effect, according to the letter and spirit thereof.

11. This defendant, in answer to the eleventh paragraph of said bill, denies that said Mutual Gas Light Company has not in any instance neglected or refused to lay mains or conductors for supplying gas-light where application or petition has been made to it by two applicants or occupants of buildings on any streets averaging two buildings in every two hundred feet of main pipe required to supply the same, and where the common council has ordered the usual proportion of lamp-post service in connection therewith; and for answer to the remainder of said paragraph, this defendant admits that the said company did not build its gas-works in the City of Detroit, but did build them without
39 the said city; but this defendant denies that the terms of said ordinance did not render it obligatory upon said company to locate its works for manufacturing gas within the corporate limits of said city, and also denies that the lapse of time since the location and completion of said works, the acquiescence of said city in said location, without complaint or protest against the same, and the contracts made from time to time by said city with said company for a supply of gas-light, precludes said city from now insisting that that failure of said company to build its works within the city limits is a ground of forfeiture of the rights conferred upon it under the ordinance of November 28th, 1871.

12. This defendant admits that the said Mutual Gas Light Company entered into an agreement with the Detroit Gas Light Company, as stated in the twelfth paragraph of said bill; but this defendant denies that said agreement does not amount to a combination with said Detroit Gas Light Company concerning the rates to be charged to the City of Detroit or private consumers; and denies that no such combination has been made or entered into by the Mutual Gas Light Company with the Detroit Gas Light Company. This defendant also denies that said Mutual Gas Light Company has in all respects fully performed and complied with all the conditions, provisions, and obligations imposed upon it by the ordinance of November 28th, 1871.

13. This defendant denies the thirteenth paragraph of said bill, and submits to the court that under the constitution and laws of the State of Michigan, the ordinance of November 28th, 1871, and each and every provision thereof, is valid and binding upon said company, and the same may be insisted upon and enforced by this defendant.

14. This defendant admits the fourteenth paragraph of said bill, except that portion thereof which alleges that this defendant has threatened to interfere with and prevent said Mutual Gas Light Company from continuing its business of distributing and selling gas within said city, and as to that portion this defendant says, that the only object of the ordinance of December 14th, 1877, is to oust the said com-

40 pany from all use of the streets of the city for the purpose of conducting gas through the mains and pipes already laid by said company, or for the purpose of making repairs, or of laying additional pipes, and also to enforce the forfeiture of the rights and property of the said company, as provided by the ordinance of November 28th, 1871.

15. The fifteenth paragraph of said bill is covered by the plea of this defendant thereto hereinbefore pleaded.

16. All of which matters and things, in this its answer, set forth as aforesaid, this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct; and humbly prays to be hence dismissed with its reasonable costs and charges in that behalf most wrongfully sustained.

GEO. C. LANGDON,
Mayor of the City of Detroit.

W. C. MAYBURY,
Solicitor for the Defendant the City of Detroit.
F. A. BAKER,
E. F. CONELY,
Of Counsel.

[SEAL OF THE CITY.] Attest: LOUIS DILLMAN,
City Clerk of the City of Detroit.

EXHIBIT A.

An ordinance to revoke and repeal the consent, permission, and authority granted by the common council of the city of Detroit to the "Mutual Gas Light Company of Detroit," to lay gas-pipes, mains, conductors, and service-pipes, in any of the avenues, streets, lanes, highways, alleys, public parks, and squares throughout said city, and to declare a forfeiture to the City of Detroit of all the gas-pipes, mains, conductors, service-pipes, and all other property of the said company situated and being within the avenues, streets, lanes, highways, alleys, public parks, and squares, within the City of Detroit, and also all its other property situated within the limits of said city.

Whereas, in the year 1871, and for a long time prior thereto,
41 there was only one company, to wit, the Detroit Gas Light Company, engaged in the manufacture and sale of gas-light in the City of Detroit; and,

Whereas, on the 15th day of September, 1871, David Preston, H. Moffat, T. K. Adams, Robert Hosie, J. F. Antisdel, Ransom Curtis, H. C. Hodges, Phillip Thurber, E. Kanter, J. Heffron, H. Weber, A. Wilkins, Thompson Dean, John P. Kennedy, and William H. Fitch, jr., presented a petition to the common council of the city of Detroit, stating therein that they and their associates and successors proposed to organize as a body corporate and politic, under "An act to authorize the formation of gas-light companies," approved February 12, 1855, for the purpose of building and operating gas-works in the City of Detroit, the said corporation to be known as the "The Mutual Gas Light Company" of the city of Detroit, and praying, in said petition, for permission to lay pipes in the streets, alleys, and public grounds of the City of Detroit, for the purpose of supplying the city and citizens with gas; and,

Whereas, the common council, under and by virtue of the power in them vested, by the statute above referred to, did grant the permission prayed for by said petitioners. by the following ordinance, viz:

An ordinance to permit certain persons to lay gas-pipes, mains, conductors, and service-pipes in the streets, alleys, lanes, avenues, squaers, parks, and public grounds of the City of Detroit, to establish a manufactory of and to vend gas-light in the said city:

Whereas David Preston, H. Moffat, T. K. Adams, Robert Hosie, J. F. Antisdel, Ransom Curtis, H. C. Hodges, Phillip Thurber, E. Kanter, J. Heffron, H. Weber, A. Wilkins, Thompson Dean, John P. Kennedy, and William H. Fitch, jr., their associates and successors, propose to organize as a body politic and corporate, under "An act to authorize the formation of gas-light companies," approved February 12,
42 1855 (Laws of 1855, page 243), and act and acts amendatory thereto for the purpose of building and operating gas-works in the City of Detroit, the said corporation to be known as "The Mutual Gas Light Company" of the city of Detroit; therefore,

It is hereby ordained by the common council of the city of Detroit:

SECTION 1. That consent, permission, and authority, are hereby given, granted, and duly vested in David Preston, H. Moffat, T. K. Adams, Robert Hosie, J. F. Antisdel, Ransom Curtis, H. C. Hodges, Phillip Thurber, E. Kanter, J. Heffron, H. Weber, A. Wilkins, Thompson Dean, John P. Kennedy, Wm. H. Fitch, jr., and their associates, their successors and assigns, organized into a corporation under the laws of the State of Michigan as aforesaid, to lay gas-pipes, mains, conductors, and service-pipes in any of the avenues, streets, lanes, highways, alleys, public parks, or squares throughout said city, subject, however, at all times, to any and all restrictions and regulations imposed upon the Detroit Gas Light Company, and the following, to wit:

1. The said corporation shall do no permanent injury to any street, alley, avenue, square, or park, or shade-tree, nor in any manner disturb or interfere with any water-pipe, sewer, or gas pipe, now or hereafter laid by any authorized person or corporation, but when they shall open ground in the same to lay any pipe, or for any other purpose whatever, they shall forthwith restore the streets, pavements, sidewalks, or ground to a condition equally as good as before, and shall promptly comply with any order or resolution of the common council or other proper authority in reference thereto.

2. The said corporation shall open or incumber no more of any street, alley, or public ground at any one time, or in any one place, than may be strictly necessary to enable them to proceed with advantage to the work of supplying private or public demand for gas-light; nor shall any street, avenue, or alley be allowed to remain open or incumbered for a longer period than shall be necessary to execute the work for which the same shall have been opened.

43 3. The said corporation shall be liable to compensate the City of Detroit, and any individual owner or owners of property adjacent to the street or alley opened and injured by them, for all damages which may result from leaky pipes, or by reason of their having opened or incumbered any street, avenue, alley, sidewalks, or public grounds in said city of Detroit. Said corporation shall at all times be subject to the city ordinances now in existence, or which may be hereafter be passed relative to the keeping or storing within the city limits of naphtha, petroleum, or other inflammable substances, and shall also be subject to all ordinances relating to inspection of gas, gas-meters, and nuisances, and shall be subject to all other ordinances of the city.

SEC. 2. In case the said corporation, within one year from the passage of this ordinance, shall not have built and completed gas-works in this

city, sufficiently extensive to enable it to manufacture gas to a reasonable amount, or if it shall at any time enter into any combination with any gas-light company concerning rates to be charged for gas, either to the city or private consumers, then the consent given by this ordinance shall cease, and this ordinance shall become null and void. And the said corporation is hereby expressly forbidden to sell its property, franchises, or privileges to any other gas-light company, under a penalty of a forfeiture to this city of its works, mains, and other property; and an acceptance of this ordinance shall be deemed a consent by said corporation that the title of said property shall vest in the city at once in case of such sale.

SEC. 3. While there exists competition in the supply and sale of gas-light in the said city of Detroit, the said corporation shall have the privilege of supplying it at such rates less than charged by the Detroit Gas Light Company, as may be agreed upon between it and consumers, public and private, said corporation shall in no instance, nor under any circumstances whatever, charge either public or private consumers higher rates for the supply of light than an average of the rates
44 charged such public and private consumers and paid in the cities of Buffalo, Chicago, Cleveland, Toledo, and Sandusky.

SEC. 4. It is further ordained that in all streets where the said corporation has not laid mains or conductors within two years from the passage of this ordinance, upon petition of at least two applicants or occupants of buildings on such streets for a supply of gas-light, averaging two buildings in every two hundred feet of main pipe required to supply the same, the company shall, when directed by the common council, lay mains in such streets, the common council ordering therein the usual proportion of lamp-post service. And in case the company neglect to lay mains when directed by the common council, they shall be subject to the forfeiture contained in section 2.

SEC. 5. The said corporation shall supply gas-light under uniform and sufficient pressure between sunset and sunrise, and the quality of the same shall be as nearly uniform as practicable, averaging for each month not less than sixteen candles, to be determined by authorized photometrical tests.

SEC. 6. Within sixty days after the approval of this ordinance the said grantees shall perfect their incorporation with the full sum of five hundred thousand dollars of capital stock subscribed, and their articles of association shall be filed in accordance with the law in such cases made and provided; and the said corporation so formed shall execute good and acceptable bonds to the City of Detroit in the sum of one hundred thousand dollars, conditioned to perform the obligations imposed upon it by section 2 of this ordinance, and all other conditions imposed upon it by this ordinance.

SEC. 7. This ordinance shall take effect at the expiration of sixty days from the date of its passage.

Approved Nov. 28, 1871.

WM. W. WHEATON, *Mayor.*

Attest: HENRY STARKEY,
City Clerk.

And whereas, the persons named in said ordinance, their associates and successors, did, under said statute, and within sixty days af-
45 ter the approval of said ordinance, organize a body corporate and politic, with the sum of $500,000 of capital stock subscribed, and designated and known as "The Mutual Gas Light Company of De-

troit," as more fully appears by their articles of association, filed and recorded in the office of the register of deeds for the county of Wayne, on the 20th day of December, 1871, and to which record now remaining in said office reference is hereby made; and,

Whereas, the said corporation so formed within sixty days after the approval of said ordinance, did execute and deliver a bond to the City of Detroit in the sum of $100,000, and which said bond, together with the certificate therein referred to, is in the words and figures following, to-wit:

Know all men by these presents, that the Mutual Gas Light Company of Detroit, in the county of Wayne, and State of Michigan, as principal, and Thompson Dean and John P. Kennedy, both of the city, county, and State of New York, and William H. Fitch, jr., E. W. Meddaugh, and Luther Beecher, of said city of Detroit, in the State of Michigan, as sureties, are held and firmly bound unto the said City of Detroit in the just and full sum of one hundred thousand dollars lawful money of the United States, to be paid to the said City of Detroit, its successors or assigns, to which payment well and truly to be made the said Mutual Gas Light Company of Detroit, does hereby bind itself and its successors and the said Thompson Dean, John P. Kennedy, William H. Fitch, jr., E. W. Meddaugh, and Luther Beecher, do hereby bind themselves, their heirs, administrators, and executors firmly by these presents.

In testimony whereof the said Mutual Gas Light Company, of Detroit, has caused this instrument to be signed by its president and duly authorized executive agent, and has caused its corporate seal to be hereunto affixed, and the said sureties have also signed and sealed the same, on this twenty-third day of January, A. D. 1872.

The condition of the foregoing instrument is such that whereas the common council of the said city of Detroit, on the 24th day of No-
46 vember, A. D. 1871, passed an ordinance entitled "An ordinance to permit certain persons to lay gas-pipes, mains, conductors, and service-pipes in the streets, alleys, lanes, avenues, squares, parks, and public grounds of the city of Detroit, to establish a manufactory of and to vend gas-light in said city, which said ordinance was, on the 28th day of November, approved by the mayor of said city; and whereas, among other things, it was provided in and by said ordinance, by section two thereof, as follows: "Sec. 2. In case the said corporation within one year from the passage of this ordinance shall not have built and completed gas-works in the city sufficiently extensive to enable it to manufacture gas to a reasonable amount, or if at any time it shall enter into any combination with any gas-light company concerning rates to be charged for gas either to the city or private consumers, then the consent given by this ordinance shall cease, and this ordinance shall become null and void; and the said corporation is hereby expressly forbidden to sell its property, franchises, or privileges to any other gas-light company under the penalty of a forfeiture to this city of its works, mains, and other property; and an acceptance of this ordinance shall be deemed a consent by said corporation that the title to said property shall vest in the city at once in case of such sale;" and whereas it was also provided in said ordinance that within sixty days after the approval thereof, the said grantees therein named should perfect their incorporation with the full sum of five hundred thousand dollars of capital stock subscribed, and their articles of association should be filed in accordance with the law in such cases made and provided; and the said corporation so formed should execute a good and acceptable bond to the city of Detroit in the sum of one hundred thousand dollars, conditioned to pe r

form the obligations imposed upon it by section 2 of said ordinance, and all other conditions imposed upon it by said ordinance; and whereas the grantees named in said ordinance and their associates, have perfected the're said incorporation with the full sum of $500,000 of capital stock subscribed, and have organized as a body politic and corporate, under and by the name of the Mutual Gas Light Company of
47 Detroit, and have caused their articles of association to be filed as required by law, in the offices of the secretary of state, and the Wayne County clerk, and to be recorded in the office of register of deeds for Wayne County (certificates of which said filing and record are hereto attached): Now, therefore, the condition of this obligation is such, that if the above bounden Mutual Gas Light Company of Detroit shall perform the obligations imposed upon it by said section 2 of said ordinance, and all other conditions imposed upon it by said ordinance, then this obligation to be void, otherwise to be and remain in full force and virtue.

WM. H. FITCH, JR., [L. S.]
President Mutual Gas Light Company.
MUTUAL GAS LIGHT CO. [L. S.]
T. DEAN. [L. S.]
JOHN P. KENNEDY. [L. S.]
WM. H. FITCH, JR. [L. S.]
E. W. MEDDAUGH. [L. S.]
LUTHER BEECHER. [L. S.]

Signed, sealed, and delivered in presence of—
WILLIAM C. LUSK, and
CHARLES NETTLETON,
As to Dean and J. P. Kennedy.

STATE OF NEW YORK,
City and County of New York, ss:

On this 23d day of January, A. D. 1872, before me, a commissioner of deeds for the State of Michigan, personally appeared the within named Thompson Dean and John P. Kennedy, known to me to be the persons described in and who executed the following instrument, and severally acknowledged the same to be their free act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal.

CHARLES NETTLETON,
Commissioner for Michigan in New York,
117 *Broadway, New York City.*

48 STATE OF MICHIGAN,
County of Wayne, ss:

I, Stephen P. Purdy, clerk of said county, do hereby certify that on the 20th day of December, A. D. 1871, articles of association of the Mutual Gas Light Company of Detroit were duly filed in this office according to law, in and by which said articles it appears that the whole capital stock of said company, $500,000, had been subscribed and taken.

In testimony whereof I have hereunto set my hand and affixed the seal of this court this 6th day of January, A. D. 1872.

STEPHEN P. PURDY, *Clerk.*

By M. J. MOYNAHAN,
Deputy Clerk.

STATE OF MICHIGAN,
County of Wayne, ss:

I, Alonzo Eaton, register of deeds in and for said county, hereby certify that on the 20th day of December, A. D. 1871, articles of association of the Mutual Gas Light Company of Detroit were duly filed and recorded in this office as required by law.

January 6, 1872.

ALONZO EATON,
Register of Deeds, Wayne County, Mich.

Certificate of filing.

STATE DEPARTMENT, MICHIGAN,
Secretary's Office, ss:

I, Daniel Striker, secretary of state of the State of Michigan, do hereby certify that on the twenty-second day of December, in the year one thousand eight hundred and seventy-one, the articles of association of the Mutual Gas Light Company of Detroit were duly filed in this office, agreeable to the provisions of law.

In testimony whereof I have hereunto set my hand and affixed
49 the great seal of the State of Michigan, at Lansing, this 22d day of December, in the year of our Lord one thousand eight hundred and seventy-one.

G. M. HASTY,
Deputy Secretary of State.

And whereas the said corporation did thereupon proceed, and from thence hitherto have continued to lay mains and pipes in and through the streets, alleys, and public grounds of the city of Detroit, and to conduct gas through the same, and to carry on the business of manufacturing and selling gas-light in said city; and,

Whereas the said corporation did not, within one year from the passage of said ordinance, or at any other time, build and complete gas-works within said city sufficiently extensive to enable it to manufacture gas to a reasonable amount, but did, in violation of said ordinance, build its gas-works without the limits of said city, to wit, in the township of Hamtramck; and,

Whereas, heretofore, to wit, on the 28th day of June, 1877, for the purpose of destroying competition between it and the Detroit Gas Light Company, the said Mutual Gas Light Company did, contrary to the provisions of said ordinance, enter into a combination with the said Detroit Gas Light Company concerning rates to be charged for gas to the city of Detroit and to private consumers; and,

Whereas the said corporation, on the day and year last aforesaid, in violation of the provisions of section two of said ordinance, did enter into a contract and agreement with said Detroit Gas Light Company, which agreement has been performed by the parties thereto, the same being in the words and figures following, to wit:

Memorandum of agreement between the Detroit Gas Light Company, party of the first part, and the Mutual Gas Light Company, party of the second part, both of the city of Detroit, and the State of Michigan, made and entered into the 28th day of June, 1877, witnesseth as follows:

1. The party of the first part hereby sells, transfers, and con-
50 veys to the said party of the second part, all main, service-pipe, feeding-meters, and connections of every kind and description now owned by it, and lying and being in the city of Detroit, easterly of the center of Woodward avenue, including its gas-holder on the easterly side of Chene street, and the land inclosed therewith, for the conveyance of which latter property a good and sufficient warranty deed is to be made.

2. The party of the second part hereby sells, transfers, and conveys to the party of the first part all the mains, service-pipe, feeding-meters, and connections of every description thereunto belonging or pertaining, now owned by it, and being and lying westerly of the center of Woodward avenue, in the city of Detroit.

3. As the difference in the value of the property so as aforesaid transferred each to the other has been agreed upon at the sum of $140,000, in favor of the said party of the first part, said party of the second part hereby covenants and agrees to pay said sum to the said party of the first part in the manner following, to wit: $20,000 on the execution of this paper; $45,000 when the connection of the pipes of the party of the first part for supplying gas in the city of Detroit, easterly of the center of Woodward avenue, are ready to be severed; when this paper and the notes and mortgages hereinafter specified shall be delivered; and the remainder in five equal installments, with interest at seven per cent. per annum, the first installment to be payable on the day of , 187 , these five installments to be secured by a promissory note of the party of the second part, payable to the order of Thompson Dean, of New York.

4. And the said parties mutually agree with each other and bind themselves that from and after the delivery and receipt of the property as herein covenanted, they will neither of them lay gas mains or pipes across Woodward avenue, and that the party of the first part will not supply gas to that part of the city lying easterly of the line of the middle of Woodward avenue, hereinbefore described, nor will the party of the second part thereafter supply gas to that part of the city lying
westerly of the line aforesaid, only as said companies respect-
51 ively shall at any time be found, against their own will, legally liable and bound to do, and in such case only in the manner and subject to the conditions hereinafter provided. Each party hereto respectively reserves to itself the right to perform in any part of the city of Detroit any acts or duties which it shall at any time be found, against its own will, legally bound and liable to do. And in the case of supplying any gas contrary to the provisions hereinbefore contained the parties so applying shall be subject to provisions hereinafter contained, to wit:

And the parties respectively agree and bind themselves each to the other for every foot of gas supplied by the party of the first part easterly of the line on the middle of Woodward avenue, hereinbefore described; after the delivery of the property herein contemplated has been made, the said party of the first part shall and will pay to the party of the second part such rate for each 1,000 cubic feet so supplied as the said party of the second part shows to be its net gain per 1,000 feet on its aggregate supply of gas to private consumers during and for the time such supply is being made by said party of the first part, or at the rate of profit per thousand cubic feet made by said party of the first part on its aggregate consumption by private consumers during such time as the said party of the second part may elect; and from

and after the delivering and receiving of the property aforesaid the party of the second part, for every foot of gas supplied by it westerly of the line of the middle of Woodward avenue, hereinbefore described, shall and will pay to the party of the first part such rate per thousand cubic feet for each thousand feet so supplied as the party of the first part shows to be its net gain per thousand feet on its aggregate supply of gas to private consumers during and for the time such supply is being made by the said party of the second part, or the rate of profit per thousand cubic feet, made by the party of the second part on its aggregate consumption by private consumers during such time as the party of the first part may elect; and all such payments, if any, are to be determined and paid monthly, one to the other.

52 In witness whereof the said parties have hereunto caused their respective names to be written and their corporate seals to be attached.

(Signed) THE DETROIT GAS LIGHT COMPANY.
SAMUEL LEWIS, *President*,
For the Mutual Gas Light Company.
T. DEAN, *Special Agent.*

And whereas the said corporation has at all times, from the acceptance by it of said ordinance, utterly and wholly neglected and refused to comply with the provisions of section four of said ordinance; now, therefore, it is hereby ordained by the common council of the city of Detroit—

SECTION 1. That the consent, permission, and authority granted by the common council of the city of Detroit to the said "The Mutual Gas Light Company of Detroit" to lay gas-pipes, mains, conductors, and service-pipes in any of the avenues, streets, lanes, highways, alleys, public parks, and squares throughout said city be, and the same is hereby, revoked, and from and after the approval of this ordinance the same shall cease and be null and void.

SEC. 2. The said "The Mutual Gas Light Company of Detroit" is hereby declared to have forfeited to the city of Detroit all its gas-pipes, mains, conductors, service-pipes, and all its other property situated and being within the avenues, streets, lanes, highways, alleys, public parks, and squares within the city of Detroit, and also all its other property situated within the limits of said city, and the title to all and singular the property above described and mentioned is hereby declared to have vested in the city of Detroit.

SEC. 3. The controller is hereby authorized and directed to take and assume possession and control of all the property mentioned and described in the next preceding section, and to notify the Mutual Gas Light Company thereof, and also to serve upon said company a certified copy of this ordinance.

SEC. 4. This ordinance shall take immediate effect.

three months from and after the fourth day of February instant, the day on which issue was joined in this cause; that said complainant take his testimony within forty days from said last-mentioned day; that said defendants take their testimony within forty days next thereafter, and said complainant the ten days next ensuing said last-
59 mentioned time in which to take his testimony in rebuttal.

60 *Note of issue.*

UNITED STATES OF AMERICA:

In the circuit court of the United States for the eastern district of Michigan. In equity.

THOMPSON DEAN, COMPL'T,
vs.
THE CITY OF DETROIT ET AL., DEF'TS.

To the REGISTER:

Please put this case on the docket for hearing on pleadings & proofs at the ensuing November term of said court.

Detroit, Oct. 14th, 1878.

(Sig'd) W. C. MAYBURY,
Sol'r for Def't City.

F. A. BAKER,
E. F. CONELY,
Of Counsel.

(Endorsed:) Filed Oct. 17, 1878. A. Mandell, cl'k.

61 *Depositions.*

In the circuit court of the United States for the eastern district of Michigan. In equity.

THOMPSON DEAN, COMPLAINANT,
vs.
THE CITY OF DETROIT AND THE MUTUAL GAS Light Co., defendants.

Testimony taken at Detroit, Mich., March 2, 1878.

WILLIAM H. FITCH, JR., sworn for complainant:

Mr. MEDDAUGH. What is your occupation, age, and place of residence?

A. Age, 47; residence, Detroit; occupation, president of the Mutual Gas Light Company; its office, 49 Monroe avenue.

Q. How long have you been president of the gas company?

A. Since its organization.

Q. Were you one of the original incorporators?

A. I was.

Q. At the time of its incorporation, had it any works constructed for the manufacture of gas?

A. It had not.

Q. When was the construction of its works or manufactory for supplying gas to the city of Detroit entered upon?

A. The contract was made on the 8th of February, 1872.

Q. How soon after the date of the contract did the work commence?

A. The contractor commenced his operations as quick as the frost would allow it; I believe it was in March.

Q. When was that part of the work used for manufacturing completed?

A. In November, 1872.

Q. Do you remember about the date?

A. It was in use, in manufacturing gas, on the 26th; we were selling gas at that date, I believe.

62 Q. Concurrent with the construction of the works, did the company enter upon the laying of pipes in the streets of the city?

A. Commenced laying pipe on the third day of June, the pipes were contracted for also on the 8th of February, 1872; commenced laying on the 3d of June, and laid some 20 miles that season.

Q. Those 20 miles were completed at what time in the year 1872?

A. Completed about the first of November. Quit laying pipes about that time on account of the weather—early in November.

Q. Where were the manufacturing works of the company located?

A. They were located just east of the city limits, on Wight street extended, I don't know as it has any name.

Q. About what distance from the eastern boundary of the city?

A. 800 or 900 feet.

Q. Upon completion of the manufacturing works of the company, was any communication made by you in behalf of the company to the common council of the city of Detroit?

A. Yes, sir. Notified them of the completion of the works, in accordance with the requirements of the ordinance. I have not a copy of my letter, but I saw it in the records at the time, printed with the proceedings.

Q. Will you look at that paper and satisfy yourself whether it is a copy of that communication?

(A paper handed to the witness.)

Mr. BAKER. The printed proceedings of the common council showing said communication, and the date at which it was received, December 10, 1872, may be read in evidence on the hearing of this cause.

WITNESS. As far as I have read it, I should say it had my ear-marks on it; I see by that we were making gas on the 15th. I state

63 here we were selling on the 26th; any man acquainted with the business will understand the difference—they make gas two or three weeks before they sell it.

Q. How soon after the company commenced the sale and distribution of gas, before they commenced to supply the city itself with gas?

A. You mean the city government?

Q. The city government, the city proper, as distinguished from the citizens.

A. Commenced almost immediately—when we commenced selling gas—at all—very shortly afterwards. We supplied the city with some gas in the month of December, not much, but some.

Q. When was the first contract for the supply of gas to the city of Detroit made between the city and the gas company?

A. I think it was in 1873. I think the first contract was for supplying the city-hall. We supplied gas before and were paid for it. The first formal contract I think was made in 1873. It was for supplying the city-hall, and I think it was in that year, I am not positive. I

was to supply the city-hall at half a cent a thousand—a million feet of gas at less than $5.00, or nearly that.

Q. Will you state whether there was a contract between the Mutual Gas Light Company and the city of Detroit for supplying them gas, made in 1875—a written contract?

(A paper is here shown to the witness.)

A. I forget as to the dates. We made several contracts.

Mr. MEDDAUGH. I now hand the witness what purports to be a contract made between the city of Detroit and the Mutual Gas Light Company. Will you state whether that is a copy of a contract between the city of Detroit and the Mutual Gas Light Company?

Mr. BARKER. The three contracts between the city of Detroit and Mutual Gas Light Company, dated, respectively, 6th day February, 1875, 1st day of September, 1876, 14th day of August, 1877, are introduced in evidence, subject to verification by counsel for defendant. Copies of which are marked, respectively, Exhibits A, B, and C, which it is agreed may be read at the hearing the same as the originals.

64 Q. There was an agreement made between the Detroit Gas Light Company and the Mutual Gas Light Company, a copy of which is given in the bill of complaint in this cause. You are cognizant, I suppose, of the making of that agreement?

A. I was.

Q. Will you state whether there has ever been any other agreement, oral or written, between those two companies, of any description?

A. A very similar agreement was made in 1872, between the Mutual Gas Light Company and the directors of the Detroit Gas Light Company, subject to confirmation by their stockholders. Their stockholders did not confirm it, therefore it fell through.

Q. Then an agreement was not come to between the two companies?

A. It was not ratified.

Q. Simply a preliminary arrangement for an agreement?

A. Yes, sir.

Q. Which was never perfected?

A. No, sir.

Q. Aside from that, then, what do you say in answer to the question?

A. No other agreement than the one written agreement made during last summer.

Q. During all this time, who has been the sole representative and mouth-piece of the Mutual Gas Light Company in the city of Detroit?

A. I have been the executive officer during the existence of the company.

Q. Will you state whether the agreement between the two gas companies, mentioned in my last question, was made on the day it bears date?

A. Made on the day of the date of the instrument. Yes, sir; it was concluded that day. That was in consideration several days prior, however—a week.

65 Q. It has been charged by the city of Detroit that the Mutual Gas Light Company has violated its contract with the city, popularly known as an ordinance, by refusing to lay mains in certain streets of the city; will you state what the facts are in the premises?

A. The company has never failed to lay mains in any instance where there were applications from consumers equal to one consumer to each one hundred feet of street main required to supply them, such applications being accompanied by an order from the council, or through

the board of public works, for the usual amount of lamp-post service on such street. These conditions complied with, it has never, in any instance, refused to lay the pipe promptly.

Q. Before the bill in this cause was filed, will you state whether the complainant made application to the Mutual Gas Light Company, its officers—to institute proceedings for the purpose of restraining the city?

A. He did, sir.

Q. From interfering with the rights and property of the company?

A. He did.

Q. Have you the record-book of the company in your possession?

A. I have, sir.

(The witness here refers to a book.)

WITNESS. He made that application on the 14th day of December, on which day the directors refused to institute any proceedings.

Mr. MEDDAUGH. I offer in evidence the record of the proceedings of the board of directors, for the purpose of showing the application, and that the company refused. I propose to show that the company refused.

Mr. BAKER. We object to it as incompetent evidence. The complainant should show by the witnesse swhat occurred.

(It is agreed that a copy of the record may be used on the hearing.)

Q. Will you read the proceedings of the board?

(The witness then reads from the record as follows:)

66 OFFICE OF MUTUAL GAS LIGHT CO.,
Detroit, Mich., Dec. 14th, 1877.

Directors' meeting held at the office of Meddaugh & Driggs, in this city, at 10 o'clock this a. m. Present, Thompson Dean, E. W. Meddaugh, and William H. Fitch, jr., a full board. Mr. T. Dean, director, called the attention of the board to the attempt now pending in the Detroit City Council to repeal the ordinance giving the company the right to lay gas-mains, service-pipes, etc., in the avenues, streets, alleys, and public grounds of Detroit, and to an ordinance which had passed the council on its third reading, in which an officer of the city is instructed to seize the property of the company within the city limits, to separate the main pipes within the city from those in Hamtramck, etc., and asked that the officers of the company be instructed to protect the property of the company from the execution of the threats contained in such ordinance; and for the preservation of all its rights under the original ordinance, to bring suit in the proper courts of law, securing an injunction restraining the city from all and any of such acts as it now threatens, and for the collection from her of sufficient reimbursements for the damages the company has sustained by reason of the late unwarranted proceedings of the common council. The matter being discussed at some length, upon the motion of E. W. Meddaugh, it was resolved that the company, convinced of the improbability of obtaining redress or justice in the local courts, which would be its only recourse in the present excited condition of the public mind, the press of the city having for some time past continually aggravated public feeling by exaggeration and falsehood, could not prudently enter into a litigation with the city, and that no such attempt on its part would now be made. This resolution was adopted, with the vote of Mr. Dean only against it.

The WITNESS. That is so much as pertains to this suit; there was other action at this meeting.

Mr. BAKER. We ask you to read the balance of it.

Mr. MEDDAUGH. I have no objection. Read at the request of the counsel.

67 Mr. Dean also called the attention of the board to the libelous character of the publications made in and by the Free Press newspaper, and to the great damage of the company's business caused thereby, the said publications being made with frequencies in nearly every issue of said paper for a number of weeks past, and asked that the officers of the company be instructed to bring suit for the recovery of the full amount of damages they may estimate as accruing from or by reason of such libelous publications in that paper against the owners and proprietors thereof, and to prosecute the same to a favorable result, or to the courts of final resort. With due consideration of Mr. Dean's proposition, upon motion of Mr. Meddaugh, the same action was had as that in reference to his request to bring a suit against the city; and for the same reasons as that assigned in that instance, it was resolved that the company would not enter in litigation with the Free Press Company, or owners of that company, Mr. Dean only dissenting.

And the directors' meeting then adjourned.

(Signed) WILLIAM H. FITCH, JR.,
President.

Cross-examination:

Mr. BAKER. How long have you lived in Detroit?

A. Since July, 1871.

Q. Where did you reside previous to that?

A. I came from Chicago here; I had lived for twenty years or thereabouts in Tennessee.

Q. What was your business before you came here?

A. Managing gas-light companies.

Q. Engaged in that business for the twenty years you resided in Tennessee?

A. Not all the time; no, sir; I was engaged in the mercantile business.

Q. How long were you engaged in the gas business in Tennessee?

68 A. I have been engaged in the gas business since 1861.

Q. Had you any connection with the gas business before that?

A. No, sir.

Q. What place in Tennessee were you engaged in the gas business?

A. City of Memphis.

Q. And you carried on the gas business from that time until you came here, in 1871?

A. Until 1871; yes, sir.

Q. What company were you connected with in Memphis?

A. The Memphis Gas Light Company.

Q. Was the complainant, Thompson Dean, interested in that company, too?

A. He was a large stockholder in it.

Q. Were you a stockholder?

A. I was a part of the time; not all the time.

Q. Where does Mr. Dean reside?

A. New York City.

Q. Has resided there all this time since 1861?

A. No, sir; I think he removed to New York in 1862, from Cincinnati.

Q. Before you came here were you and Mr. Dean interested in the gas business in any other place beside Memphis?

A. No, sir; well, yes, we were in business, but not in the practical business of gas-making.

Q. But you were doing a gas business in other places?

A. No; we were not doing a gas business; we were interested in patent processes for making gas that might be sold anywhere.

Q. Were you stockholders in any gas company?

A. Not in any other company manufacturing or furnishing light.

Q. Mr. Dean was?

A. Mr. Dean has held stock in a great many gas companies.
69 He was a large owner in the Cincinnati gas works at one time, and he has owned several other gas-works scattered over the country.

Q. You were never interested in any other gas company besides that and the one here?

A. That is all, sir, of works manufacturing gas.

Q. When did you first come to Detroit? Give us the date.

A. Do you mean to reside?

Q. Yes, sir; come here in connection with this business.

A. I came here in July, 1871; I stated that before.

Q. You came here for the purpose of organizing this company?

A. Did not come with that view. I came here to look at it; to see the city; to see what there was in the gas business here.

Q. It was with the view to organize a gas company?

A. Subsequently I did. I did not have the view when I came here—when I started to come here. Subsequently I came to the conclusion that would be a good thing to do.

Q. What time did you come to that conclusion?

A. Some time in the latter part of July, or the first of August, 1871.

Q. Did you have any conference or correspondence with Mr. Dean before you came?

A. I don't remember now whether I had with reference to Detroit or not; don't remember that I had. To make you understand that, Mr. Dean had sold out a very large investment in Tennessee; sold it out upon condition that I would follow his investment somewhere else, and I had a sort of roving commission from him—I speak of it in that way, no technical sense—to hunt up a place to invest the money. He had three hundred and fifty thousand dollars or four hundred thousand dollars there he wanted to invest, and he wanted to put it in gas. I made three or four trips to the city of Peoria; came near buying that concern. I endeavored, through a friend of his, to get a franchise in Chicago, and I think I got the first intimation there about Detroit. I got there some information of Detroit. I had been here some twenty-five years ago. I looked around, and I heard something about
70 it, and, I believe, the first suggestion was that I should go over to Detroit to see what the stock was worth—what I could buy gas stock for. I think I stated that to Mr. Dean.

Q. Who else was interested in this endeavor for this purpose, to come here to manufacture gas beside you and Mr. Dean?

A. Other parties became interested as soon as it was determined upon.

Q. But originally you and Mr. Dean were the only ones?

A. I presume that was all there were.

Q. How soon afterwards before any one else became interested with you?

A. Oh, the moment I drew up a petition to the council for an ordinance permitting us to lay pipe, other parties joined with us, such as we sought or found—anybody who was willing. I came here a perfect stranger; a number of people took an interest immediately; quite a number; small interests; and then some parties in New York became interested.

Q. Who were the parties in New York who originally took an interest in that?

A. I don't remember now. A gentleman by the name of Smith; there was Brown and Rand and a man by the name of Nichols.

Q. Were they people that were engaged in the gas business in the city of New York?

A. They were engaged—not generally; were familiar with it.

Q. Stockholders in companies there?

A. I don't know that they were there.

Q. But they were interested in the gas business?

A. Yes, sir; had been practically engaged in it; are yet in other places.

Q. Was a man by the name of Kennedy interested in this company at this time—this movement?

A. Mr. Kennedy was interested. Yes, sir; I believe his name appears among the incorporators—John P. Kennedy.

Q. You drew a petition to the council yourself, didn't you?

A. Yes, sir.

71 Q. Have you got a copy of that petition?

A. No; I have not.

Q. Did you keep a copy at that time?

A. I suppose I did until I saw it in print somewhere, and then tore it up.

Q. You endeavored to have the residents of Detroit sign that petition?

A. No, sir; except those who were stockholders of the company or proprietors. There were not a great many who signed it. A subsequent petition was presented by the people of Detroit to the council.

Q. Who circulated that subsequent petition?

A. I don't know. They were all strangers to me.

Q. Did you or any of the gentlemen who were interested with you cause that petition to be circulated?

A. Caused it to be; yes, sir; did not personally do it. I was an absolute stranger. I employed parties to do it who were recommended to me.

Q. Do you mean you employed and paid parties to do it?

A. Yes, sir; indirectly; had a broker do all this business.

Q. Who was he?

A. Alvin Wilkins.

Q. It was through him this citizens' petition to the council was circulated?

A. Yes, sir; it was very numerously signed. I think it was twenty-two yards long. That petition was printed also, and laid before the council—printed as well as in manuscript.

Q. What was Wilkins's business here?

A. He was a broker.

Q. A financial broker?

A. Had a sign of that sort up over his door. He was, like all the

rest of them, a stranger to me. I merely dropped into his office by reason of his sign. I knew nothing about him. Found him an intelligent, sharp sort of a man, and was struck with his fitness for this business. He showed me by files of old papers that he had endeavored himself to get a franchise a few years before. He had moved in the matter once himself.

72 Q. Do you remember the substance of the petition which was presented by you and Mr. Dean and others to the common council?

A. I don't remember anything beyond its general tenor—the request. We requested——

Q. Never mind now.

A. They passed an ordinance permitting us to lay pipes in the streets.

Q. You saw the substance of that petition afterwards published in the papers of Detroit?

A. I believe it was published with the proceedings of the council. I am not positive about that, whether that particular petition was or not. It went before the council, and was referred, I believe, to a special committee.

Q. Have you ever seen the petition since?

A. I have not, that I know of.

Q. Did you not state in that petition that you would furnish gas at lower rates than the Detroit Gas Light Company, supply a very superior gas-light, and be restricted in price, in case there was no competition to govern it, at an average price charged in other cities on the lakes, and comply with such other regulations and restrictions as might be agreed upon?

A. I can't say whether I did or not. I don't think it contained any provision of that sort. It is possible it did. I know it was short, and could not get very much in.

Q. Have you any recollection as to whether it contained any such language as that?

A. It may or it may not; I don't know.

Q. That was your intention at that time, was it not?

(Objected to as immaterial.)

A. My intention to what?

Q. What I have recited to you—the substance of the petition.

A. Expected to sell gas-light at a less rate than the Detroit Gas Light Company was then selling it, which was three dollars a thousand.

Q. You have no copy of that petition, as I understand you?

A. I have no copy.

73 Q. Didn't keep a copy?

A. Regarded it of no importance at all. The ordinance covered all the points.

Q. Did you appear before a committee of the common council?

A. Yes, sir; several times.

Q. Did Mr. Dean appear with you?

A. No, sir.

Q. In appearing before the common council you acted for yourself and associates?

A. Yes, sir; I did.

Q. Talked the matter over pretty fully with the committee?

Mr. MEDDAUGH. All this testimony is objected to as immaterial.

to a special committee. I got a notice of the time when the committee would meet, and an invitation to meet them. I went there and intro-

A. I had sent my petition to the common council, and it was referred duced myself to them—that was the first time I had ever seen any of them—and the matter was discussed pro and con. I found one man very bitterly opposed to it, and he said some pretty ugly things, but after a very few minutes I convinced the balance of the committee he was mistaken, and I did not have very much trouble after that.

Q. At the time this petition was pending in the common council did you have any negotiations with the Detroit Gas Light Company in any way?

A. No, sir.

Q. After the ordinance was passed, and before the erection of your works, did you have any?

A. No, sir; had no negotiations with them except those I have mentioned in my direct evidence.

Q. Did you not make a proposition to the Detroit Gas Light Company before you presented your petition to the common council?

A. No, sir. Let me ask you what you mean by a proposition—a proposition with reference to another company? If that is what you mean, I say no, sir.

74 Q. A proposition with reference to the manufacture of gas in the city of Detroit?

A. No, sir; never had any conversation looking to it or intimating it. The only approach to a negotiation I had with them was indirectly or through a broker. I endeavored to buy one-half of the stock in the company, and I wanted a list of their stockholders, and the broker could not get it. He could not get any information at all. Then I concluded we had better build works, and I never had any communication with them as to whether I would do it or not. They were the last parties whom I should have consulted.

Q. Was there not a negotiation between you, your associates, and the Detroit Gas Light Company, in which it was proposed by you and your associates that you would not build gas works in the city of Detroit if they would pay you a certain consideration?

A. No, sir; nothing of the kind; not a breath of it ever occurred—not a breath.

Q. So your only proposition to them was to buy their works, or a part of the stock?

A. Not to buy their works; gas-works are not bought in that way; proposed to buy their stock. I could not ascertain even who owned the stock—could not get any satisfaction or information about it.

Q. Soon after your company commenced the manufacture and sale of gas in this city, the Mutual Gas Light Company made a proposition to the Detroit Gas Light Company substantially like the agreement which was entered into last summer?

A. No, sir. After we had commenced building our works, and considerable of a period prior to the manufacture of any gas, we had negotiations with regard to the division of territory, which is recited in my direct testimony.

Q. Those negotiations commenced about the same time that you commenced building your works?

A. Yes, sir; I presume so; about that time. It was after my contracts were made.

75 Q. Have you a copy of the agreement that was entered into with the directors of the Detroit company?

A. I believe I have; if I have not given it away lately, I have. It was not confirmed; therefore, fell through. It was substantially the

same as the one afterwards made. There was a difference in the amounts of money, and in some other respects, but substantially the same. The terms were the same; the amount was different.

Q. The division of the city was the same?

A. On the same line.

Mr. CONELY. Did you make a proposition to divide the city prior to your commencing to erect works?

A. No, sir. Let me qualify that a little. Before we had made our contracts there was no talk with them at all; hadn't had any until after the contracts were made.

Mr. BAKER. Have you copies of those contracts you made for building your works and laying of pipes?

A. Yes, sir.

Q. Did the same contractor have both jobs?

A. No, sir; the pipe was laid by the company—day's works—did it myself. No prudent gas company would lay pipe by contract. They don't do that.

Q. Who was the contractor for building the works?

A. John P. Kennedy.

Q. One of the stockholders of this company?

A. Yes, sir.

Q. A stockholder from the beginning?

A. Yes, sir; whether he appears so upon the paper or not he was so from the inception.

Q. You think you have a copy of that contract?

A. Yes, sir; it is in that book; you can turn to it, if you want to; a copy of it is there.

Q. Will you look at that contract, if it is necessary in order to answer my subsequent question? Did your contract with Kennedy require him to complete your works as they are now, or substantially—that is, your works for manufacturing?

A. Yes, sir.

76 Q. Will you state the amount of that contract?

A. I will read it. It was modified a good many times before it was concluded.

Q. Well, as finally made.

A. I will read you enough so that you will understand that.

Mr. MEDDAUGH. I object to all this as incompetent and immaterial.

NEW YORK, *February 1st*, 1872.

To the President and directors of the Mutual Gas Light Company of Detroit, Michigan:

GENTLEMEN: I will furnish all the materials and build, erect, and finish, in a good and workmanlike manner, according to the plans and specifications submitted by me, the coal and naphtha gas-works for your company for the sum of one hundred and forty-two thousand nine hundred and forty dollars, freight on such articles as will be shipped from here to the premises to be added, at the lowest rates attainable, without profit. Should you determine not to build the gas-holder and tank, the price would be reduced forty-two thousand and fifty-two dollars. Should you use the oxide process instead of lime, the deduction for lime-trays or sieves would be one thousand dollars. Payments to be made monthly, as the work progresses, the undersigned giving satis-

factory security for the faithful performance of the work in strict accordance with the plans and specifications.

Respectfully submitted by

JOHN P. KENNEDY,
Gas Engineer and Contractor.

The WITNESS. That was modified at various times. On February 7th the following was received:

NEW YORK CITY, *February 27th*, 1872.

T. DEAN, Esq.:

MY DEAR SIR: I have revised my figures on the within proposal, and have changed the figures from $98,190, without delivery, to $92,000 delivered, as per inclosed statement. This is the lowest figure I could do the work for.

Yours, very truly,

JOHN P. KENNEDY.

77 The WITNESS. On February 8th the following was received:

NEW YORK, *February 8th*, 1872.

William H. Fitch, jr., esq., president Mutual Gas Light Co. of Detroit Michigan:

DEAR SIR: I will build the works of your company, as per plans and specifications submitted by me, less the exceptions made in my revised statement of the 6th instant, for the sum of $90,000—one-half cash and the other half in the stock of the company at 75 per cent. on its par value, it being distinctly understood that I am to have my stock at as low a price as any holder. Payments to be made monthly, as the work progresses. Please signify your acceptance in writing.

Very truly, yours,

JOHN P. KENNEDY.

P. S.—It is understood that the above work is to be in running order by September 1st, 1872.

JOHN P. KENNEDY.

The WITNESS. That entry is indorsed on the face: "Accepted 8th February, 1872. William H. Fitch, president." That, sir, forms the contract fully.

Q. I understand the total cost under that contract of the works is as they are now?

A. The cost of the works as they are now?

Q. Yes, sir.

A. The cost of the works specified in Mr. Kennedy's contract is easily ascertained; $90,000 is what his contract came to. There were some little alterations made, and payments made for them in addition to this.

Q. What additional work was performed besides that done by Mr. Kennedy?

A. A good many things—docks built, coal-houses built, grading done.

Q. That was done by contract?

A. No, sir; it was done by the company; docks and railways, coal-houses, hoisting apparatus, and so on, $30,000 or $40,000. Mr. Kennedy's contract was certain specified work he did.

78 Q. The rest of the work was done by the company?

A. Yes, sir. Mr. Kennedy had nothing to do with the laying of the mains at all—nothing of that sort. He merely built what is technically called gas works, not what is generally called gas works—simply the manufacturing apparatus.

Q. Mr. Kennedy did not build the holder for you?

A. Yes, sir; he did. That is part of the gas-works; technically, it would not be a gas-work without some place to put the gas into.

Q. So that was included in the contract of $90,000?

A. No, sir; it was added afterwards.

Q. How much did that cost?

A. You see the exception he made in the cost. In case he did not make the holder, or tank, the price was to be reduced $42,050; if he built a holder, that much was added. Mr. Kennedy's contract amounted to that.

Q. How was Mr. Kennedy paid?

A. Mr. Kennedy was paid half cash and half in stock, according to the contract.

Q. Was the stock of the company paid up?

A. Seventy-five cents on the dollar paid.

Q. Mr. Kennedy took his stock at that rate?

A. Yes, sir; all the stockholders did—that is, seventy-five per cent. on $500,000 was paid up.

Q. That is, $375,000 paid in cash?

A. Mr. Kennedy's was paid in work; bought pipe of Mr. Wood on the same conditions. He paid for his stock in pipes. I paid for mine in cash. Mr. Meddaugh paid for his in cash.

Q. After the rejection of this agreement that was made with the directors in 1872, were any negotiations had until last summer?

A. No, sir; no negotiations.

Q. There was no effort between the two companies to come to an agreement until the agreement was made last summer?

A. There may have been individual conversations between some of them. I don't know as to that. Parties were continually work-
79 ing—figuring individually. There was nothing in the character of any negotiations between the two companies; and personally, as far as I am concerned, there was not anything personal. I presume that the stockholders—I expect that Mr. Meddaugh may have talked with some of them; so might Mr. Dean, and various others. There was no negotiation as between the two companies from the failure on their part to confirm a contract that was made with the directors, up to the consummation of the contract in 1877, five years.

Q. What was the Detroit Gas Light Company charging for gas at the time you came here—in 1871?

A. Their minimum of prices, everything considered, was $3. They had penalties, and one thing and another that increased that. Three dollars was the minimum price.

Q. What were they charging at the time you commenced to manufacture and sell gas?

A. They reduced their price 25 cents a thousand—$2.75.

Q. At what price did you commence to sell gas?

A. At $2.75.

Q. The same price they charged?

A. The same price per thousand feet; but our gas weighed twice as much as theirs, and was therefore one-half cheaper. Gas is valuable on account of its specific gravity.

Q. From that time until the consummation of this agreement of 1877

you maintained an active competition with the old company, did you not?

A. Very active, I should judge. I don't know what construction you desire to put upon the term "competition." They sold gas almost always at a less rate per thousand feet than we did. Our gas, however, was cheaper. They sold gas at 50 cents per thousand; we sold at $1. We never sold at less than that, except to the city. We sold to the city at 39¾ cents per thousand. We desired to have some competition, but the city would never support it. It would not stand competition at all; never wanted any. We never could get one-fifth as much as they were willing to pay the old company; would not give it to us.

80 Q. The gas furnished the city was procured upon advertised proposals?

A. Yes, sir.

Q. You would bid and the old company would bid?

A. Yes, sir; I bid 39¾ cents, the old company $2; the council gave it to the old company. I entered a protest against it, as a tax-payer, threatening that I would have them restrained. They then reconsidered it, and concluded to let us have the contract. I then insisted upon having the contract price for a full year, but they said it must conclude at the 1st of July; so I only got ten months at that rate. They paid $1.60¾ difference for two months.

Q. In laying your pipe, in what part of the city did you proceed to lay pipe first?

A. Do you want to know where I began?

Q. Yes, sir.

A. On Griswold street was the first place I broke ground.

Q. At the time you entered into this agreement, in 1877, how many miles of pipe did you have on the west side of Woodward avenue?

A. About twelve miles.

Q. How much on the east side?

A. Twenty-eight, I think. Our works were on the east side, and we would naturally have more pipe there. That was the reason why we would have so much more pipe there.

Q. Do you state that is the only reason why you laid so much pipe there, on the east side of the city, because your works were on the east side?

A. That is the only reason I know of; naturally would be so.

Q. Was not this the reason—that the two companies eventually contemplated a division of the city between the two companies?

A. No, sir; that entered in no possible sense into the calculation. If it did I will convince you now——

Q. I don't care for any argument.

A. I don't care to make any argument. If it had we should 81 have laid the excess down here, because in case of division we would get pay for it.

Q. What size pipe did you lay in the city of Detroit?

A. There is my first contract (referring to a book).

Q. I don't care anything about the contract.

A. 16, 12, 10, 8, 6, 4, and 3 inch, inside diameter.

Q. Depending on the street?

A. Depending on what I was going to use the pipe for.

Q. Was there any marked difference between the size of the pipe, speaking generally, on the west side of the city and of the east side?

A. No more difference than would occur from the difference in loca-

tion. You see everything that went into the west side had to come from the holders on the east side, a long distance, therefore the largest pipe would be nearest the holder and gradually lessened as it went from the holder; because the further it goes the less it has to supply, you understand.

Q. So the pipe on the west side of the city would average smaller than the east side of the city?

A. I don't know that it would per mile. No, sir; the pipe that was laid mostly on the west side was laid with a view of extension, and it was large in proportion to its extension. There was no 12 or 16 inch pipe there; it was not necessary. There was 10, 8, and 6 inch in an unusual quantity for the amount in use, large for the twelve miles of pipe, because it was in view of extending from it. A year or two later the average would have been less, because of extensions that would have been made from the feeders. We first run those down.

Q. The common council has repeatedly directed or requested the company to lay mains in streets where you have not complied with the request. I am not now speaking with reference to any conditions.

A. Oh, we have had requests to lay pipe, but not accompanied with the conditions required in the ordinance.

Q. But the common council has repeatedly asked you to lay pipe and you have refused to do it.

82 A. Haven't done it; but always have done it where the request was accompanied by the conditions required by the ordinance; always.

Q. Did you send any communications to the common council informing them of the reasons why you failed to comply with their request?

A. I think I did.

Q. When?

A. I don't remember now, but since you mention, I think I wrote them a communication stating the reasons why it was not done in a certain instance. I think I did. I am almost positive I did.

Q. Well, they ordered you——

The WITNESS. However, these papers were usually brought by aldermen representing some committee of some sort, and I never failed to tell them the reason—never failed to tell them why.

Q. The common council has ordered you to lay pipes in streets where there was the usual amount of lamp-posts, and you have refused.

A. What street have you reference to?

Q. Any streets. Do you remember any streets where they have ordered you to lay pipes in the streets?

A. They did not order any lamp-posts.

Q. Were there not a number of such streets where there were lamp-posts in the streets?

A. That is true. There is one that I remember.

Q. What street?

A. Larned street west. There were no lamp-posts ordered, and we had not an application from a solitary consumer on the street. They ordered pipe laid in Larned street west, and they did not order any lamp-posts, and we did not have an application from a single consumer in the street; not one.

Q. Hadn't those applications been made to the common council?

A. That I don't know.

83 Q. Then your refusal to lay pipe in the streets were based upon the fact that the applications were not made directly to the company by the consumers?

A. No. I will take it in any shape it comes, if it has the conditions.

Q. We want to get at facts, not your construction of the conditions. If the application was made—if the common council directed you to lay pipe, and the company itself had received no application from the consumers, would you refuse to lay the pipe?

Mr. MEDDAUGH. Never mind what you would do.

A. As I asked in that very instance—"Does the common council guarantee payment for gas under this order?" We had no opportunity to make a contract with the party whom we furnish material to. We asked the council to permit us to make a contract with the parties to whom we have to supply gas.

(The answer is objected to as not responsive.)

Q. Then you always insisted that the application should come from the consumer to the company?

A. We do insist on making a contract with the parties to whom we furnish gas.

Q. You have always insisted, have you not, that they should allow you to supply the street-lamps in the street in which you laid your mains, whether or not any other company was already supplying them?

A. We do insist upon that interpretation of the ordinance, that the common council has no right to order mains laid unless they order street-lamps.

Q. But if lamp-posts are in there they must put in an additional set of lamp-posts if they desire you to lay mains there?

A. Yes, sir.

Mr. CONELY. Do you desire to be understood in this way, the common council order the lamp-post service, the Mutual officers considered and acted upon it in that way; that they are entitled to the benefit of the gas consumed in these lamps?

A. That is what it means by "service."

84 Q. You consider that service meant service from your company?

A. Yes, sir.

Q. That they could not let it to some other company?

A. Yes, sir.

Mr. BAKER. Do you know of any case where the council ordered you to lay mains in a street in which the buildings upon the street did not average according to the ordinance?

A. There have been such cases.

Q. Do you remember the cases?

A. I don't just now. Yes—I may not be correct as to the street; it seems to me that on Alexandrine avenue there were not enough houses built upon the street. It is one of those cross-streets up in there, and it was not fully opened. The only way we had of reaching it was to come way back down the avenue and lay the pipe up one of the parallel streets.

Q. But in most of these cases there were two buildings for every two hundred feet?

A. In no case was there any that had two houses to every two hundred feet. There were houses, but no gas-pipes in them.

Q. Then you refused to lay gas-pipes, although there were buildings enough to average two buildings to every hundred feet?

A. I should not presume that a man with no gas pipe in his house would want gas, but if he comes to me and agrees to burn gas as soon as the pipes are laid, that is enough.

Q. If the pipes were not in the building you would refuse and have

refused, because there was no certainty that he would take gas from you?

A. No, sir. I have not done any such thing. I think I might with propriety, but I have never done it.

Q. Have you ever laid any pipe at the request of the common council?

A. Yes, sir.

Q. In what streets?

A. Prospect.

Q. Any other street?

85 A. Yes, sir. A number of them. I don't remember now; quite a number. I will tell you one now to show you how such things work—Farnsworth. The common council wanted gas laid there; we were entitled to eight lamp-posts; well they could not do that—the usual number would be eight, and all they could squeeze out were four. I said, "Gentlemen, I will waive that; I am entitled to twelve consumers there." "Well there are four houses building there, they will all take gas surely." I went to two thousand dollars' expense; put in the pipe and service-pipe to every man's house, meters and all, and one of them is burning gas, and he did not burn enough gas to pay.

Q. Were there two buildings on that street for every two hundred feet?

A. No; and as I told you, there ought to have been twelve consumers, and I laid it for eight.

Q. When did you lay that?

A. In September or October.

Q. Last year?

A. Yes, sir; 1877.

Q. Did you ever waive anything in any other street?

A. Yes, sir.

Q. What street?

A. I don't remember now. You may go and look around where we have pipe in, miles and miles of street we haven't anything but shanties on.

Q. In regard to these requests of the council, you have acted from the commencement upon the theory that the applications of consumers should be made to the company, and not to the council?

Mr. MEDDAUGH. I object to the question. It is immaterial upon what theory he acted.

A. I have uniformly taken these papers, as referred to me from the city, from the common council, or from any other quarter, no matter where they came from, as merely intimations that there was some business in that quarter. My first step is to have the houses counted

86 in the territory—good, bad, and indifferent. The man comes back and tells me there is only about one house for every three hundred feet, and I drop it; or he comes back and reports there is a sufficient number of houses. I then send him or some other employé of the company, with applications to the company for that purpose, to sign the contract by which they agree to take gas from the company, and authorizing the company to connect service-pipe; to take care of the meter which we loan them, and that we shall have the meter back when the contract shall terminate—an agreement and contract. If he gets a sufficient number of contracts on that line, I then say to the parties interested in that matter, "Now, gentlemen, if you will get the common council to order the usual amount of lamp-post service there, we will put in the pipe." I have taken this as an intimation that there was business there, and we have sought it. There is the character of

the agreement (produces the paper); we have one of those for every meter we set. That we call an application. It would have taken a dray to have hauled them all around here. That is what we call an application. This tells what they will do, as well as what they want us to do.

Q. If these applications were made on a street averaging two houses for every two hundred feet, at the terms named by the company here, would you go on and lay the mains?

A. With an order for lamp-posts we always have done it.

Q. If you have done it without all these conditions being complied with, you did it on your own motion?

A. Yes, sir.

Q. But in those cases you regarded you were doing it on your own motion?

A. Yes, sir. Take, for instance, the case of West Larned street. The city, in effect, said, We will compel you under the ordinance to lay your pipe in this street; we don't want your gas here; we want your pipe here, so the old company will bring down the price of gas to fifty cents. I gave that application to parties on the street to sign, but we could not get a signer; there was nobody to supply.

Q. And you refused, for that reason?

87 A. No, did not refuse. I told them when they complied with the conditions of the ordinance we would lay it.

Q. And unless they did you would not do it?

A. Unless they complied with the conditions of the ordinance we would not.

Q. Among those conditions you insist that the consumers on the street should take gas of your company?

A. Of course, a certain number of consumers should take gas.

Q. Two for every two hundred feet?

A. Yes, sir.

Q. And that the city should agree to let you supply the lamp-posts?

A. Yes, sir.

Q. You meant by that you were to have the supplying of the lamp-posts there?

A. I didn't care whether they were put in double or not; that was the condition.

Mr. CONELY. I suppose you informed these applicants of the common council's conditions. You informed them of your interpretation of that ordinance?

A. Invariably. If anybody asked us what it meant, we told them.

Mr. BAKER. In the case of Larned street, what price did you ask for gas?

A. What the ordinance allowed us. I asked them an average price charged in Cleveland, Buffalo, and other points.

Q. Is this a blank application such as you asked that the consumers should sign upon Larned street?

A. That is exactly what I asked them to sign.

Q. Did you ask it in each case?

A. I asked it in no case. Their alderman came with a list of names on a paper. I says, Some of them they don't want gas; here are blank contracts; you get them signed. He took them and could not get them signed.

Q. You refused in every case to comply with the requests of the council unless these contracts were obtained from the consumer?

88 A. Well, I didn't refuse in any instance.

Q. Did you ever refuse to lay pipe?

A. I never did.

Q. Did you ever neglect?

A. I never did. Filled any orders of that kind where there was quid pro quo.

Q. Then unless you got these contracts you would not lay the mains and did not lay the mains?

A. Oh, I laid a great many mains without any contracts at all.

Q. I know; but where the common council requested it, you would not do it unless they procured these contracts?

A. No; you don't understand me at all. I say in every instance where they came with a threat that they would force me under the ordinance to run a pipe, I wanted contracts of that kind. I wanted all the ordinance gave me, if they had all the ordinance didn't give me.

Q. And you refused on that ground?

A. Yes, sir; on West Larned street; no, not entirely. We neither had consumers nor lamp-post service ordered. There was no cousumption of gas ordered in any shape, either in lamp-posts or houses.

Q. Upon those grounds you refused?

A. Yes, sir; and I would——

Q. You did on other streets?

A. No, sir; they came in every sort of shape. Anybody that thought they wanted gas, or pretended they wanted gas would send in a petition. There is a petition (produces a paper); what sort of a contract is that to do business on? Half a dozen people "respectfully request" me to lay pipe in the street at a cost of $10,000. They don't agree to take gas. There was one where they ordered it within thirty days, and there were no consumers to supply it to and no lamp-posts ordered. I did not lay pipe there; didn't do it. I sent a man there to canvass it to get contracts.

The witness produces a letter from the city clerk of the city of
89 Detroit, dated June 28th, 1876, and directed to the president and secretary of the Mutual Gas Light Company, of which the following is a copy:

"CITY OF DETROIT,
"*Clerk's Office, June 28th*, 1876.

"To the president and secretary of the Mutual Gas Light Company, Detroit, Michigan:

"GENTS: At a session of the common council, held on the 23d of June, A. D. 1876, the following resolution was adopted, nays none:

"'By Ald. Rouland:

"'Resolved, That the city clerk be, and is hereby, directed to notify the Mutual Gas Light Company to lay gas-mains on Fort street, from Campau avenue to the east line of the Dubois farm, within thirty days from this date.

"'Ald. Heames moved to amend by including Fremont street.

"'Lost.

"'Ald. Christian moved to include Beaubien street. The amendment was accepted by Ald. Rouland. The question then recurring on the resolution as amended, the same was adopted.'

"As per instruction I send them to you as directed.

"Very respectfully, yours,

"CHAS. H. BORGMAN,
"*City Clerk.*"

Q. You received this notice from the city clerk, didn't you?

A. I don't know; I got it. I don't know who I got it from. It is a notice, and I have got it. I didn't lay the pipe. I will tell you what I did do.

Q. State what you did in the premises.

A. I sent an agent through the territory described to see who wanted gas.

Q. Did you send with him these blanks?

A. Yes, sir; he could not get a single contract for gas; not one. So I had neither consumers nor lamp-posts, and was ordered to lay pipe. Why should I lay pipe?

Q. Is this the paper; is this one of the blanks that you sent (hands a paper to the witness)?

96 A. No, sir.

Q. What did you send?

A. This is the one I sent (Exhibit D, of which the following is a copy):

"Service-pipes and meters supplied free of charge.

"No. .

"To the Mutual Gas Light Company:

" , the subscriber, being the of the premises No. , Detroit, occupied as a , request the Mutual Gas Light Company to connect service-pipes therewith, and supply with illuminating gas at said premises.

"The amount consumed to be ascertained by a meter to be furnished or approved of by this company; to pay promptly for gas consumed in monthly or weekly payments, as required, up to the time when notice shall be given at this company's office to discontinue the supply; to permit free access of the company's agents at all reasonable hours to inspect or remove the meter, if found defective; to deliver the same in good order when this agreement terminates, and in default of payment for gas consumed the subscriber authorizes this company to remove the meter and stop the supply of gas. Service-pipes and meters, being furnished free of charge, remain the property of the company.

"Sign here .

"Send bills to .

"Dated Detroit, 187 ."

Across the end of the above blank is "Office, Hodges' block, corner State and Griswold streets."

The WITNESS. That is the application I asked these people to sign through their or through my agent, and he could not get a signature.

Q. What instructions was the agent given as to the price that would be charged?

A. No instructions; whatever we charge other people.

91 Q. Did your agent report to you, or not, whether there was an average of two buildings for every two hundred feet of pipe to be laid on that street?

A. My agent reported to me that there were no parties there who would contract for gas.

Q. Did he make any report to you as to the number of buildings?

A. He might; I don't remember as to that.

Q. Then you did not refuse for the reason that there was not the requisite number of buildings?

A. I refused because no one wanted gas. No one wanted to buy; and the city did not order any lamp-posts. I didn't have anything to do there except to lay pipe.

Q. Were there any lamp-posts in the street?

A. I believe not.

Q. Was the old company in the street?

A. I believe not.

Q. You have never laid pipe there?

A. No. I mentioned that Farnsworth street matter; there is their paper (witness here produces a paper); but on this intimation I got them to sign these contracts, and after signing them there is to-day only one burning gas.

Q. Have you the request that was sent to you in the Farnsworth street matter by the common council?

A. No, I have not. We laid the pipe in Farnsworth street; sorry I did, very sorry about that, $2,000 for us; that much thrown away. I brought these simply to show you an instance where there was no consideration for laying pipe. Ald. Rouland had two or three houses there that he wanted to have rented, and he wanted pipe run through there so he could rent them. Just the same as any ether alderman would. Any alderman could put through any resolution he wanted to.

Q. Can you name any other street where you have refused to comply with the request of the common council?

A. I did not refuse in that instance.

Q. You did not lay the pipe?

A. No; I didn't.

92 Q. Do you remember any other instance where you did not lay the pipe when requested by the common council?

A. Not at present. I don't say there is not, under similar circumstances.

Q. A good many others?

A. Oh, no; but there are some others. In every instance where I have failed, the application has been blemished with like characteristics. Either there were no people that wanted it, or no lamps. I believe there was one street they ordered lamps, but there was but one man on 1,000 feet that wanted gas, and he would not agree to take it, except at the minimum price of competition.

Mr. CONELY. When you say there was no man who wanted gas, you mean there was no man who would sign this application?

A. Yes, sir. I sent a man there when the city ordered it. It was up here on Croghan street. I sent a man up there to canvass.

Mr. BAKER. What application did you send?

A. I sent the original; the same as this.

Q. Did you ever send any of these? (Shows a paper to the witness.)

A. No; they were gotten up for a different purpose. That was used in West Larned street only. I sent the original application up on the street.

Q. Do you swear these were not used in any case where the council ordered it?

A. I am not going to swear any such thing. The difference is this: We started in one season to lay pipe, competing with the other company. We did not lay pipe anywhere unless there was a showing for it. We laid pipe wherever the old company had it. We were just going simply on your theory. We wanted to force a division, and we laid

it wherever they had pipe. If we laid it down here, in case of a division they would get it, and we would have the most duplicate. Our policy would be, if we wanted to force a division, to lay the pipes down here.

93 Mr. CONELY. And the cheaper and smaller pipe?

A. Not necessarily, because in the settlement we were going to pay them, and we would duplicate as little pipe in the territory we expected to get as possible; that would be policy. We were laying pipe all over here where they had pipe, to get their consumers from them; they were charging down here 50 cents a thousand, and where we had no pipe, $3.00. Howard, Elizabeth, all that class of streets, we would go along and say, "Will you take our gas at a dollar a thousand if we will put it in"? "Oh, yes; take it, sure." "If you people want our gas at a dollar a thousand, we will put it in." We put $10,000 worth of pipe on Howard street; well, they would come in to pay their first bill; "The old company say they will let us have gas at 80 cents; I guess I will go to them." "All right, go to them; your custom is not worth anything, but it is one dollar you contracted with us for." I drew up a special application for that class of cases, for that sort of work; that is, city business not ordered by the council; and I put in a clause, " hereby instructs the Mutual Gas Light Company to supply him with illuminating gas, and agrees to use the gas of said company for a period of not less than two years." That is not in those other applications. That is the reason why I know it was sent, and how I sent it; but the written applications were not worth any more than the others—not any more than their verbal agreement.

Q. This is the blank used in Larned street, Exhibit E?

A. Yes, sir.

The following is a copy of Exhibit E:

Application.

"No. .

"To the Mutual Gas Light Company:

"The subscriber, being the of the premises No. , Detroit, occupied as a , hereby instructs the Mutual Gas Light Company to connect service-pipes therewith, and to supply with illuminating gas at said premises, and agrees to use gas of said company at a price within the limitations of its charter, to say not exceeding the av-

94 erage of prices at the time charged for gas in the cities of Buffalo, Cleveland, Sandusky, Toledo, and Chicago.

"Service-pipes will be laid and meters set at the following rates: For tapping mains and laying pipe to curb-line for one-inch pipe, $10; one-and-¼-inch pipe, $12; one and-½-inch pipe, $15; two-inch pipe, $20. For laying the continued service from curb-line to the meter for one-inch pipe, 20 feet or less, $8; excess, 40 cents per foot; larger sizes in proportion. For setting meters for three lights, $5; for five lights, $6; ten lights, $8; larger sizes in proportion to cost. The company in all cases claim the right of laying service-pipe from the main to the meter and setting the meter.

"The amount consumed to be ascertained by a meter to be furnished or approved of by this company; to pay promptly for gas consumed in monthly or weekly payments, as required, up to the time when notice shall be given at this company's office to discontinue the supply; to permit free access of the company's agents at all reasonable hours to inspect or remove the meter if found defective; to deliver the same in

good order when this agreement terminates; and in default of payment for gas consumed, the subscriber authorizes this company to remove the meter and stop the supply of gas. Service-pipes, connections, and meters remain the property of the company. The company shall be entitled to collect from applicant full remuneration for cost of taking up and restoring all pavements it may be necessary to disturb in laying services, and to charge reasonable rent for meters at its discretion. At the time of receiving this application the company may require money security, to the estimated cost of laying service and setting meter, and before gas is turned on, money security to the amount of two months' consumption of gas.

" hereby agreeing and binding to comply with the above regulations, and to make payments and deposits, as stipulated above. Witness signature.

"Detroit, 18 . Sign here. ."

Across the end is the following: "Office, Hodge's block, corner State and Griswold streets."

95 The WITNESS. That is with reference to West Larned street; the others were with reference to other streets.

Mr. BAKER. At the time you made this agreement with the Detroit Gas Light Company, in 1877, what were you charging for gas upon streets where both companies had pipes?

A. We were charging a uniform price throughout the city, without any difference.

Q. I mean just before this agreement was made?

A. Just before that? We have never charged two prices.

Q. Well, what was the price?

A. One dollar per thousand, net price; two dollars if they didn't pay before the 10th of the month.

Q. What was the price you charged for gas immediately after you entered into that agreement?

A. $2.50, with a discount of 25 cents a thousand if paid before the 10th of the month.

Q. You continue to charge at that rate?

A. We do yet, sir.

Q. The old company adopts the same rates?

A. Yes, sir; they are charging the sames rates.

Q. They made a change at the same time you did?

A. Yes, sir.

Q. There was no agreement between the two companies in fixing those rates?

A. No, sir.

Q. Was there any talk between the men interested in the two companies?

A. None that I know of.

Q. Did you talk with any of them as regards the price to be charged for gas in the future?

A. No, sir; I did not.

Q. Did you receive any intimation or knowledge as to what that company proposed to charge?

A. No, sir; I didn't know anything about it.

Q. What day did your company decide to charge at that rate?

96 A. I believe it was on the 28th of June we came to the conclusion. I had circulars printed and circulated on the 30th of June, and I must have come to the conclusion a day or two before as to

what the price should be, because they were printed and issued the 30th. Soon after that I saw the same circular issued by the other company, and until then I did not know it. This was based on our own calculation as to the full rights, and as to what would be politic. I regarded that as what it ought to be sold at under the circumstances.

Q. This notice was issued at the day of the date?

A. Yes, sir; and addressed to consumers.

Q. This was mailed to all your gas consumers?

A. Distributed by hand to our consumers of gas in Detroit; delivered at every house consuming gas east of Woodward avenue. This is a copy:

"EXHIBIT F.

"OFFICE MUTUAL GAS LIGHT COMPANY,
"*No. 49 Monroe avenue, corner Farrer street,*
"*Detroit, Mich., June 30th,* 1877.

"To gas consumers:

"You are hereby notified that, until further notice, this company will, from and after this date, supply gas at the rate of $2.50 per thousand cubic feet, less a discount of 25 cents per thousand cubic feet, if paid at the office of the company on or before the 10th of the month following that in which the gas charged for was consumed. Notice, also, that the 10th of the month falling upon Sunday or any legal holiday discount will be allowed on the day following; and note, further, that as this discount is given expressly to secure payment within the time and in the manner specified, none will be allowed, under any circumstances whatever, after 5 o'clock, p. m., city time, of the last discount day; and that failure to receive a bill for gas used will not constitue a claim for discount, as the consumer's indebtedness does not depend upon receiving monthly bill, but solely upon the fact of the company's having supplied gas at the premises.

"By order of the directory.

"WILLIAM H. FITCH, JR.,
"*President.*

"Office hours: 9 a. m. to 5 p. m."

97 Mr. BAKER. What was the total cost of the gas-works in Hamtramck?

A. I don't know now. I could tell you by reference to the books.

Q. What was the total cost of all the gas-pipes that you laid in the city?

A. I don't know that without reference to the books.

Q. Has the company borrowed any money on bonds and mortgage?

A. Yes, sir.

Q. How many mortgages has it executed?

A. I think they have executed five.

Q. All outstanding?

A. No, sir.

Q. How many are outstanding?

A. Really, they are all outstanding, so far as that goes, but one. She has executed in all six mortgages. One mortgage is satisfied, and proceedings have been had for foreclosure.

Q. One mortgage of the six has been paid?

A. Yes, sir.

Q. And there are five mortgages on the property that are outstanding?

A. Yes, sir; proceedings had for foreclosure, and terminated in a sale a week ago, or this week.

Q. Was the first mortgage foreclosed?

A. No; the first mortgage was not. The sale was subject to the first mortgage.

Q. Were bonds executed in connection with these mortgages?

A. Some of them—four of the six.

Q. Who holds these mortgages; who were they given to?

A. They were given to the trustees named in them. Mr. Driggs, I think, was trustee; Joseph Warren and C. F. Dean were trustees.

Q. A relative of Thompson Dean's?

A. Yes, sir; he is a son.

Q. Which mortgage was foreclosed in the order of priority?

98 A. The second mortgage was satisfied. I believe it was the third, fourth, and sixth, perhaps, that was foreclosed.

Q. The third, fourth, and sixth mortgages?

A. Yes, sir.

Q. Involved in the foreclosure proceedings?

A. Yes, sir. The foreclosure was made subject to the other mortgages.

Q. So there are five mortgages outstanding?

A. Yes, sir.

Q. What is the aggregate amount of the mortgages?

A. Somewhere about $650,000, a little more. I don't remember exactly; but interest and all it is over $650,000.

Q. The company negotiated those mortgages?

A. Yes, sir; negotiated the bonds; didn't negotiate the mortgages; negotiated the bonds—sold them.

Q. Do you know how much the company realized on those mortgages?

A. I don't know here. I could tell at home, at the office; I don't remember.

Q. They did not realize the full face?

A. No, sir; bonds are not selling for their full face, generally. The last that we sold, we sold at 60.

Q. Do you hold any bonds?

A. No, sir; personally, I don't.

Q. Do you know how much Thompson Dean holds, if any?

A. Yes, sir; he holds bonds to the amount of $380,000, or more.

Q. Anybody hold any bonds for you?

A. No, sir.

Q. Can you give me the names of the present stockholders of the company?

A. Yes, sir; I could at my office, probably.

Q. Can you here?

A. No; I don't remember them; 25 or 30 of them. Can get that in the record at Lansing, for that matter.

Q. How much stock do you hold?

A. One hundred and fifty shares.

99 Q. How much a share?

A. Fifty dollars.

Q. How much does Thompson Dean hold?

A. Four thousand eight hundred and fifty shares.

Q. How much does Mr. Meddaugh hold?

A. I think he holds ten shares; I think it is ten; may be it is twenty.
Q. Does Mr. Driggs hold any stock?
A. Yes, sir.
Q. How much does he hold?
A. Ten shares, I think.
Q. Does Mr. Kennedy hold his stock yet?
A. I believe so.
Q. How many shares does he hold?
A. Somewhere about a thousand.
Q. Who called the directors' meeting of December 14th?
A. I did, sir.
Q. When did you issue the call for it?
A. On that day.
Q. Was Mr. Dean in the city that day?
A. Yes, sir.
Q. How long had he been here?
A. He had been here from 10 o'clock the previous night, I suppose.
Q. Did you notify him at New York to come here?
A. Oh, I didn't notify him in New York to come here.
Q. Well, wherever he was, then?
A. I notified him here of the directors' meeting, if that is what you had reference to, after he came.
Q. But you notified him to come here before you called the directors' meeting, did you not?
A. No, sir; I didn't notify him at all.
Q. Did you write him?
A. I wrote, sent in copies of this repealing ordinance, and he came out here.
Q. Did you advise him to come?
100 A. I did not. I would not presume to advise Mr. Dean. I stated to him the facts, and let him do as he pleased.
Q. The question is whether you advised him?
A. I say no. I advised him, using the term in that sense, of the condition of things existing here in relation to the company.
Q. Did you suggest to him he had better come on?
A. No; I don't know that I did. I would not do that. I am not in the habit of doing that with Mr. Dean. I state what business difficulties, if any, exist; then he uses his own pleasure. He is older than I am.
Q. He came immediately to see you on coming here?
A. No, sir; I went to see him. I always meet him at the depot, and he stops at my house—one of my family; when he comes here, always stops there. There is a sort of reciprocity about it. When I go to New York I stop at his house generally.
Q. He got here the night before?
A. I think it was. I think so.
Q. Did you have any conversation with him that night about the gas business?
A. I think very likely, though I don't remember what it was now; but it would be very strange if we did not have.
Q. Did you and he discuss the question as to what it was best to do under the circumstances?
A. That is very probable, although I don't remember. I knew what his idea was at once. He wanted a prosecution commenced against the city immediately; that is what he wanted—wanted an injunction.
Q. He told you so. Did he tell you so?

A. Why certainly he wanted that, and his talk and my view on that subject led to the directors' meeting.

Q. Whose suggestion was it to have a directors' meeting, yours or his?

A. Well, I don't remember as to that. He wanted a suit brought against the city, and he proposed to bring one. I had a different theory, but my theory did not suit him, and in part, at least, Mr.
101 Meddaugh, when we came to get together, coincided with my views in part, as set forth in the resolution there.

Q. Were your reasons correctly set forth in that resolution?

A. So far as it goes. I have a different idea of a remedy, though, from any suit at all. I propose to settle it by force. If a man undertook to take the property I proposed to shoot him on the spot. That is what I proposed to do, and I certainly would have done it.

Q. That was the only remedy you suggested?

A. I just proposed to resist anything of the sort by physical force; that was my idea.

Q. And shoot any man on the spot who meddled with you?

A. Yes, sir. If I failed in that we would have recourse for damages, and I still think that is the right way to do it.

Q. You proposed if any one meddled with you to shoot him on the spot?

A. I would as quick as wink, most assuredly, as quick as I would a burglar in my house at midnight.

Q. Did Mr. Meddaugh concur with you?

A. I said as far as the resolution went, it represented my feeling, but did not represent all my feeling in the matter.

Q. It is said in that resolution you don't think you could obtain justice in the local court.

A. Yes, sir; I didn't believe we could; don't believe it yet.

Q. How did that question happen to come up?

A. What?

Q. About the question of justice in the local courts.

A. Mr. Dean suggested we should bring suit.

Q. In the local court?

A. What else could the company do? The company has no access to any other court; that I knew, and he knew; had been there before.

Q. And you and Mr. Meddaugh were opposed to it because you could not get justice in the local courts?

A. That is Mr. Meddaugh's view of it, and his views as expressed; but I would not have commenced any such suit at all.

102 Q. Mr. Meddaugh thought a suit of some kind ought to be commenced?

A. I don't know; at any rate he was opposed to bringing one in the local courts; that he very clearly expressed; that it was useless.

Q. Did he explain to you and Mr. Dean that whichever party was defeated in the local tribunal could take an appeal to the supreme court of the State?

A. I don't think Mr. Meddaugh made any expression in my presence that enlarged at all upon the resolution. That was read—the resolution of record.

Q. Will you swear he did not?

A. No; but I think that fully expresses everything he said in my presence; I think so. He may have talked longer than it takes to read that; there might have been some redundancy of expression, but that is the summary, I think; includes all that he expressed.

Q. But he did not agree with you in resisting the city with force?

A. I don't think I ever advanced my theory to him. I don't think I did. Didn't expect to ask any advice on that score.

Q. Didn't you have any discussion about that remedy at the directors' meeting?

A. No, no; there wasn't any discussion about it at the directors' meeting.

Q. When Mr. Dean proposed the company should commence a suit in its own name, what arguments were advanced by you or Mr. Meddaugh against that?

A. They are fully set forth in that resolution.

Q. Are those all the reasons advanced?

A. I don't remember.

Q. Didn't you state to Mr. Meddaugh and Mr. Dean that you thought no suit ought to be commenced at all?

A. I don't remember that I did; I don't think that I did. I might have said that as far as I was concerned, in my opinion, I would not favor a suit. That might have been the case; I might have said that; but I should not, and I never do, suggest to Mr. Dean a mode of action.

103 Q. You were a member of the board of directors.

A. So was he.

Q. You had as much of a voice there as he.

A. That is true. I preferred to take suggestions, rather than make them.

Q. He is a larger stockholder?

A. Yes, sir.

Q. And you deferred to him somewhat?

A. Yes, sir. There is another reason, too, why I would not be very talkative in a directors' meeting, as a matter of delicacy. When the board of directors meet I am presiding officer, and not in a place to enter into discussion. Stockholders' meetings are generally presided over by some gentleman who is elected, and I would allow myself more liberty of expression than I would at a directors' meeting, though if there were anything occurring in a meeting of the board of directors to which I had very strong objections, I would not hesitate to make it known; but ordinarily, as business would drift along in the board, everything going about right as I supposed, I should not interpose any trivial objection or suggestion; neither would any other presiding officer.

Q. Mr. Dean expressed his views pretty fully?

A. I don't know that he did; he didn't have much opportunity. He expressed his views upon the necessity of a proceeding of some sort.

Q. Did he say anything about the court where the suit should be commenced?

A. He asked the codirectors to bring suit; that was his request.

Q. Did he state where he wanted it brought?

A. Oh, no; he didn't have any choice about that; he wanted a suit; left that to their discretion, or to the attorneys.

Q. Did you explain to him that a suit could not be successful which could not be successfully conducted in the State court?

A. There was an explanation in the resolution adopted.

Q. Did you also explain that orally?

104 A. I don't know that it would admit of explanation. I think it was as plain as twice two is four.

Q. Did you? that is the question.

A. I think whatever remarks were made were fully included in that resolution—the gist of it.

Q. Did he agree with you that a suit could not be successfully maintained in the State court?

A. I don't know whether he did or not. He asked the directors to bring a suit in the State courts as the only place they could do it. They declined to do it—that was what the action was on—on his request; and they declined to do it—that is the action that took place.

Q. Did you have any conversation with Mr. Dean about how you would vote in the directors' meeting before the meeting commenced?

A. Before the meeting he knew exactly what my views were.

Q. You did converse with him about it?

A. Well, I said we conversed. You asked me if we conversed prior to the meeting?

Q. Yes, sir.

A. I presume we did.

Q. You canversed how you would vote?

A. Why, certainly. I was opposed to bringing any suit at all; told him that from the outset.

Q. What did he say to that?

A. I don't remember what he said; he allowed me, as I did him, to think for himseif.

Q. Answer my question.

A. I don't know what he said, if anything.

Q. Didn't he tell you that he wanted you to vote the way he did?

A. No, sir.

Q. Didn't you give him to understand that would be satistactory to him?

A. No, sir; he didn't say anything of the sort.

Q. Well, you knew it would be.

A. I presumed it so.

Q. Didn't he express himself as anxious to have this case in the United States court?

105 A. I don't know as he expressed himself in that way at all.

Q. Can you answer that he did not?

A. No; I will give you the benefit of my impression. I had an impression then that he would prefer taking it in the Federal court, the same as any other non-resident would.

Q. You went to the directors' meeting with that impression?

A. That was my impression; yes, sir.

Q. If you had understood that Mr. Dean had wanted that suit brought in the State court you would have voted the other way, would you not?

A. No; I should not.

Q. Do you swear to that?

A. Yes, sir; I would not have favored a suit in the local court at all, under any circumstances. I would not have had any confidence in the result, for the reason stated in the resolution, and the aggravated condition of public sentiment, making it impossible to secure justice in the local court in this locality.

Q. Upon that ground, then, you would always have voted so under any circumstances?

A. On that ground and under similar circumstances to those then existing I should always vote that way; yes, sir.

Q. You would do that with a view to enabling some of the stockholders to commence a suit in the United States court, would you not?

A. That was not my view?
Q. Didn't you vote at that time with this view?
A. I knew that would be the result of my vote.
Q. And you voted with that view?
A. No; I told you I was opposed to bringing a suit at all.
Q. In the State courts?
A. Yes, sir, in the State courts. I knew that a vote of that sort would enable Mr. Dean to bring a suit in the Federal courts; I knew that.
Q. And therefore you voted that way?
A. No. I didn't say therefore I voted in that way; I voted against bringing a suit here, because I did not believe it politic to do it; didn't believe that; don't yet.
106 Q. You would have been in favor of bringing a suit in the Federal court in the name of the company if it could have been done?
A. I don't know whether I would or not; I know it could not be. I did not spend time contemplating impossibilities.
Q. The principal object, then, of the directors' meeting, and of your vote, was to enable Mr. Dean to commence this suit in the Federal court.
A. Is that your declaration?
Q. I put that to you as a question.
A. You said the principal object I had was to do this.
(Question repeated.)
A. I don't know whether I thought of any object. I knew, however, that would be the result; that I knew well.
Q. Will you answer my question whether or not that was the principal object of the meeting?
Mr. MEDDAUGH. Of the meeting and of your vote, both, it is.
Mr. BAKER. We will separate it—of the meeting first.
A. The object of the meeting as set forth by Mr. Dean——
Q. Will you answer my question?
A. Yes, sir; when I understand it. The object of the meeting, so far as Mr. Dean was concerned, was to have the company bring a suit, and the company refused to bring the suit.
Q. Do you claim that you can't understand the question I have just propounded to you?
A. I did not understand it to be a question; I understood it to be a declaration.
Q. I will put it over again. Was not the principal object of the directors' meeting to enable Thompson Dean, a stockholder, to commence this suit?
A. I can only answer for myself. I called a meeting of the directors, on advice from the other directors that it was necessary that one should be held; I knew what the object was of that call. So far as I was concerned, my vote was given for the reasons that I had explained; and I say further, I knew that the result of that vote would be to en-
107 able Mr. Dean to bring a suit in the Federal court, and, personally, I was pleased that it would enable him.
Q. What director was it that advised you it was necessary to have a directors' meeting?
A. Mr. Dean said it was necessary to have a directors' meeting. He advised it.
Q. Did Mr. Meddaugh advise it?
A. Mr. Dean and I called on Mr. Meddaugh the next morning after

he got here, and he said that, or I told Mr. Meddaugh we had decided to have a meeting of the board, and asked him whether he would come up; I think he suggested "As you are all here, there is a full board; we will hold the meeting here;" and we did hold it.

Q. Did you tell Mr. Meddaugh the object of the meeting?

A. Well, I can show you what I did tell him.

(Witness here refers to a book.)

Mr. BAKER. I will withdraw the question. What did you say to Mr. Meddaugh as to the object of the meeting?

A. I told him it was necessary to hold a meeting of the directors in reference to the proposed action of the city; in consideration of the proposed outrage. That is what the meeting was held for.

Q. Did Mr. Meddaugh or Mr. Dean inform you that to enable Mr. Dean or any other stockholder to bring suit in the Federal court it would be necessary for the board of directors to refuse to bring one in the State courts?

A. I will relieve you upon that point. There is no doubt——

Q. Just answer my question.

A. No, they did not; because both of them knew I knew of all that; been through the mill often enough to know it; it was not necessary; neither one of them thought it was necessary to do such a thing.

Q. You knew how it was done?

A. Yes, sir; I knew exactly.

Q. You admit, then, that the principle object of the directors' meeting, and of the vote at that meeting was to enable Mr. Dean to commence that suit.

108 A. No, sir; I don't admit any such thing; I didn't admit that.

Q. You swear that was not the principal object?

A. I can't tell what the object of the meeting was; I know my own object of the meeting.

Q. That was your object?

A. I didn't say so.

Q. Do you say it was not?

A. I didn't care whether the directors had their meeting or not.

Q. Do you say it was not their object?

A. Yes, sir; I will say so; but when the meeting was held I knew the result of that meeting, what it would be, and what effect it would have; that I knew; knew all about that. I had been asked to call a meeting.

Q. Before that, who had been the attorney or solicitor of the Mutual Gas Company?

A. The attorneys of the company were Messrs. Meddaugh & Driggs.

Q. As soon as this vote at the directors' meeting had been had, Mr. Meddaugh and Driggs were retained to commence this suit in the United States court, were they not—were employed to do it?

A. Well, that lies between them and Mr. Dean; I don't know.

Q. Did you have anything to do with it?

A. May have been cognizant of what was going on.

Q. Don't you know they were immediately employed to go on and commence this suit?

A. Oh, yes; I know that they were, and that they did; Mr. Dean employed them.

Q. You assisted them in framing the bill in this cause, or furnished them with facts in the history of the company?

A. They were so familiar with it, I doubt whether they asked me; if they had asked me I would; I don't remember, now, that they asked

me a single question with reference to the bill, either they or Mr. Dean; I heard the bill read when it was prepared.

109 Q. You have assisted Mr. Dean in every way possible in maintaining this suit?

A. He has not called on me for any assistance; he has not asked me for any.

Q. Did you hear the bill of complaint read?

A. I did.

Q. Before it was signed and filed, didn't you?

A. Yes, sir; yes, sir; I was present when it was read to Mr. Dean; I was not present when he executed it.

Q. But you were present when it was read to him?

A. Yes, sir; if I understand it.

Q. You have consulted with Messrs. Driggs and Meddaugh about the conduct of this suit; about the management in its different states?

A. They have not found it necessary to consult with me any; I am not a lawyer.

Q. You have talked with them about the case?

A. If they asked me any questions about the facts, I ascertained them on the records.

Q. Then the company, as represented by you, is not antagonistic to the maintenance of this suit?

A. Not as persons; we cannot help ourselves; we are defendants to the suit.

Q. You favor it, don't you?

A. We are defendants to the suit.

Q. You favor the suit, don't you?

A. Personally, I do.

Q. The company does, don't it?

A. I don't know about that; I am not the company.

Q. You represent the company?

A. Yes, sir; but the company may not coincide in all my views on theology or law.

Q. You have almost the sole management of the company, have you not?

A. Well, they trust me pretty largely about it, in the execution of its business—purchase of its materials.

Q. Have you held a directors' meeting since then?

110 A. No, sir.

Q. When this bill was read over, you and Mr. Meddaugh and Mr. Dean were all present?

A. Yes, sir; I believe it was Mr. Meddaugh that read it to Mr. Dean, and I was present; I forget whether any one else was present or not; may have been.

(Witness here refers to the record.)

The first previous meeting of the directors was February 9, 1877.

Q. Mr. Dean owns a majority of the stock in the company, don't he?

A. No, sir; I told you that he owned 4,850 shares; that is not a majority.

Q. How many shares are there in all?

A. 10,000.

Q. You and him together own the majority?

A. No, sir; we don't.

Q. Are all the shares taken?

A. Mr. Dean and I together own exactly one-half.

Q. Are all the shares taken?

A. The company owns two hundred and thirty shares, I think.
Q. You and Mr. Dean own exactly 5,000 shares?
A. Yes, sir.
Q. Then you own a majority of the voting shares?
A. Yes, sir.
Q. Who is the next largest stockholder?
A. I am not certain, but I think John P. Kennedy.
Q. Do you remember how many shares he holds?
A. About 1,000; perhaps a little over a thousand. I forget exactly; may be 1,050, something like that. There are not any very large stockholders after that, except in one instance.
Q. Who is he?
A. "That" is two gentlemen.
Q. Who are they?
A. Messrs. Meddaugh & Driggs, a firm.
Q. Their 20 shares is the next largest?
111 A. No, sir; Mr. Meddaugh has 10 or 20, and Mr. Driggs has 10 or 20, and Meddaugh & Driggs 800. I was afraid you would not get at it, so I thought I would tell you; I have been waiting for an opportunity to get at it. My own opinion is that it don't matter much, for it didn't sell for enough the other day to reach the stockholders. There is a firm of brothers in Philadelphia that own considerable, but they made a dividend of it and divided it up. They owned 260 shares each.
Q. Has the company ever declared a dividend at all?
A. No, sir; it has never made one; never could.
Q. No; never will, will it?
A. I think that company is about whipped out. I think all that will cause it to exist in the future on paper are some entailments in the shape of mortgages, bills payable, and so on.
Q. Has Mr. Dean been in the city since that directors' meeting; since that occasion when he came here and filed that bill?
A. Yes, sir; he has been here since.
Q. How many times?
A. I don't know whether he has been here once or twice; once I know. He was here the present week; left here on last Tuesday. I am not certain but he was here once in April, between the filing of the bill and last Tuesday, but I am not sure of that?
Q. Did you talk with him when he was here about this case, at that time?
A. The other day?
Q. No, sir; when he was here on either of those occasions?
A. No; I don't think I had any talk with him, except to tell him, to communicate to him, any steps that were taken from time to time.
Q. You are watching the case here for him?
A. No, sir; watching on my own account.
Q. Don't you advise with him by letter?
A. You mean communicate?
Q. Yes, sir.
A. I generally write him a letter once a week that generally embraces all these matters.
112 Q. Do you write such letters to other stockholders?
A. No; any other having a great amount of stock that are here in the city, that I want to communicate with——
Q. Haven't you acted more or less as the agent of Mr. Dean?
A. No, sir. Mr. Kennedy is also in New York, within a few steps of

Mr. Dean's office, and he can go in and ascertain from Mr. Dean anything about the company, and formerly was in the habit of doing so; saves writing two letters.

Q. You regard it as part of your business, in your relation with Mr. Dean, to watch his interests and protect them as well as you can?

A. Mr. Dean is an old friend of mine, and I would have a keen sense of interest in his business here or elsewhere, and I would take pleasure in doing it.

Q. In regard to the business of this gas company, you have always done so, have you not?

A. Any interest that he has had. He has had some other interest in Detroit besides the gas interest. I have looked after them occasionally; sometimes have gone away from here to other places for him; once went to Texas.

Q. Never mind that. Have you furnished any money to conduct this suit?

A. No, sir.

Q. Has the company?

A. I don't know as the company has furnished any. If an occasion turns up and some money is wanted, I will furnish it.

Q. The company expects to pay the expenses of this suit?

A. I don't know; that is a matter for the company to settle hereafter. There is no such thing determined upon. I don't know what it may do in the future. There has nothing been done on that score.

Q. So far as you were concerned, you would pay them?

A. Yes, sir; personally.

Q. Expect to do that?

A. I could not say that. I expect to do what I am directed by the stockholders or board of directors, for the directors.

Q. It is the calculation now for the company to pay these expenses?

113 A. Never heard any one mention it but yourself.

Q. What is your calculation?

A. I don't know. I never heard anybody talk about it but you.

Q. Do you know whether Mr. Dean has paid any money or not?

A. I have not been advised that he has; haven't reached a point when any money has been demanded. Personally, I will guarantee any legitimate claim they had against Mr. Dean. He is good for all his obligations, and will be good for all he makes.

Q. Was there not an understanding, tacit or expressed, between the members of the board of directors, that the board, as such, should refuse Mr. Dean's request to bring suit?

A. Read over the question.

(Question is here read to the witness.)

A. I don't know as there was any understanding of that kind, tacit or expressed. My impression was that the board would. That I said before. I don't know what the other members of the board thought about it. I am pretty well satisfied, so far as my impression is concerned, that Mr. Dean expected that they would refuse it, because he knew that I had talked with Mr. Meddaugh.

Q. How did you get that impression?

A. Because I knew that Mr. Meddaugh was opposed to bringing any suit in the local courts, and I knew that he was, and Mr. Meddaugh and I being a majority of the board, I had a pretty good idea that the majority of the board would do so.

Q. Then, the object was to get it away from the State courts?

A. That was the result.

Q. That was the object, was it not?

A. That was the result of the meeting, and the natural result of the feeling that I knew I had and Mr. Meddaugh had.

Q. Was not that the object of it?

A. I don't know that it was.

Q. You would not swear it was not?

A. No; I would not swear what object Mr. Meddaugh or Mr. Dean had. I swore before I had no such object.

114 Q. Do you mean to say now that you did not have any such object?

A. I mean to say just what I said before.

Q. Haven't you repeatedly stated in your examination here, that one of the reasons that you voted as you did on the board of directors was that you could not get justice in the State courts?

A. That is exactly it; and I always stated in that connection that I was opposed to bringing any suit; that I proposed to protect it by force. That was my proposition.

Q. But you did not state that on the board of directors.

A. No; I didn't say anything about it. I was presiding over the board. I let the codirectors do the talking.

Q. That was not discussed in the meeting of the board of directors?

A. No, sir. That pistol remedy was not.

Q. All the remedy you discussed on the board of directors was the remedy by suit?

A. No. The question whether the company could obtain justice in the local courts was under discussion in the meeting. The question of bringing suit in the Federal court was not mentioned in the meeting. It may have been thought of. I thought of it. The other members may have thought of it. It was not discussed or mentioned.

Q. Was it not talked of before the meeting?

A. It may have been.

Q. Didn't you talk with Mr. Dean about it?

A. I don't know but we did. I would have understood what the effect of such an action would have.

Q. Do you swear you did not so talk with him?

A. No, sir.

Q. Do you swear you don't remember whether you had any conversation with him about it?

A. I will swear that I don't remember any such thing.

Q. Your memory is good, isn't it?

A. First rate.

Q. But you don't remember whether you had any such conversation or not?

115 A. I will enlarge a little upon this; if you will have it put in here, you will fully comprehend it when you come to read it over again. I want to give you my ideas. I want to give you my views as to the legal standing of the thing.

Q. I don't want that.

A. It will enable you to comprehend me, and will save your asking a dozen questions.

Q. I will ask you a question. Did not you and Mr. Dean fully understand that if the company refused to commence a suit, that that fact would enable him to commence a suit in the Federal court?

A. Didn't Mr. Dean understand it so? Didn't I?

Q. Yes.

A. I have no doubt but Mr. Dean did, and I did.

Q. Was it or was it not necessary to have any conversation on the subject?

A. No, sir. If you had taken my explanation, it would have saved some time. From former experience I did not believe it was necessary to have a meeting of the board of directors to enable him to do so. I did not think it was, yet that was the way it was suggested, to hold a meeting; they wanted a meeting. I didn't deem it necessary at all.

Q. Did Mr. Meddaugh tell you it was necessary?

A. I don't know that he said so.

Q. Did he, or did he not?

A. I don't know.

Q. Did anybody say it was necessary?

A. I don't know that anybody thought it was. It was only a different way of doing the thing. I had presumed, and I think so still, that if Mr. Dean, or any other party had agreed, Mr. Kennedy, or any other party out of the State, had written me, calling my attention to the facts, and had asked me, as executive officer of the company to bring a suit in court, and I as executive officer of the company had declined to do so, that would have given them an opportunity.

Q. You fully understood that before the meeting was held?

A. Yes, sir.

116 Q. You have no doubt but what Mr. Dean did?

A. I have no doubt that he did, because we had both had an experience of the same kind before, only we did not hold a meeting before.

Q. You have no doubt Mr. Meddaugh understood it?

A. I don't know what Mr. Meddaugh understood.

Q. You talked with him about it?

A. I don't remember it.

Q. Who suggested it was necessary to have a directors' meeting?

A. I think it was Mr. Dean's suggestion. I think so.

Q. Didn't he say it was necessary to have one?

A. I think he expressed a desire to have the board meet. He was here.

Q. Did he not express the opinion to you that he thought it was necessary to have one?

A. He wanted one. He requested it. He knew it was not necessary. Mr. Dean knew it was not necessary to have a directors' meeting, but he desired one, and we held it.

Q. He did not state why he desired a directors' meeting?

A. I don't think he did.

Q. That was tacitly understood?

A. I understood it myself. I supposed he wanted it of record—a refusal by the directory. I suppose he wanted it there. He knew we would refuse. I told him that I would.

Q. How did he know the directors would?

A. I knew that Mr. Meddaugh did not wish to have any litigation in the local courts, he had so expressed himself to me; it was useless to bring a suit in the local courts in the present excited state of the public mind. I talked with him about it some days before.

Q. And it was with that tacit understanding that you held this meeting?

A. We didn't have any understanding about meeting at all. The meeting was rather an unexpected event to me as far as I was concerned. It was not a positive necessity.

Q. Who drafted the record—the record you have read?

117 A. Your humble servant. I did.

Q. Did you talk it over with Mr. Meddaugh, as to how it should be done?

A. No, sir.

Q. With Mr. Dean?

A. No, sir.

Q. Did you read it to them after you had written it?

A. I did not.

Q. When did you write out that record?

A. In about twenty minutes after the meeting adjourned. I walked from here to the office and opened the book and wrote it from memory.

Q. Did you consult with Mr. Meddaugh or Mr. Dean about the language of it at all?

A. No, sir.

Q. Was Mr. Dean present when you wrote that out?

A. No, sir. Never saw it, I don't believe.

Q. Did Mr. Meddaugh or Mr. Driggs inform you about how it ought to be?

A. No, sir. I simply wrote out the minutes of the meeting, as I do all other meetings.

Q. As you understand it?

A. As I understood it. They are open to inspection at the next directors' meeting; they are open to review. I certified it as president, and I don't think Mr. Meddaugh ever saw it until to-day. The resolution that Mr. Meddaugh offered was not in writing; he offered it orally; that is my recollection, at any rate. Don't presume it was exactly the language he used. Mr. Meddaugh has never objected to it; to the form of expression I gave it. He acquiesces in it, and I presume the other directors would sign it; therefore I guess it would pass as the minutes of the meeting.

Q. Had you had this experience that you speak of in gas cases?

A. Yes, sir.

Q. Had such an experience in Memphis, didn't you?

A. Yes, sir; where it was desired that a suit should be brought in the Federal court.

118 Q. So that you and Mr. Dean were thoroughly cognizant of the rules of law upon the subject?

A. Yes, sir. I will tell you a little further, so you will understand. It was utterly impossible for Mr. Dean to appear in the court and swear to the bill. He made me his agent. I was also the executive officer of the company. As his agent, W. H. Fitch, jr., wrote a letter to W. H. Fitch, jr., secretary of the company, asking him, as secretary, to bring a suit in the local court. Fitch, secretary, refused the application of Fitch, agent. Whereupon Fitch, agent, filed a bill for Mr. Dean. Your brother attorneys made a good deal of sport about the antagonism existing between Fitch, agent, and Fitch, secretary; but it stood, although it was avowed that it was made for that purpose. It also develops the fact that I was innocent. Did not believe that any directors' meeting here was necessary for that purpose. I never understood there would be a directors' meeting until it was suggested that as we were here we had better have a meeting of the board.

Q. At the time this agreement was made with the Detroit Gas Light Company last summer, as I understand you, the company had about forty miles of pipe in Detroit?

A. Yes, sir.

Q. How many meters did it own?

A. I don't know how many it owned. We had in use about thirty-two or thirty-three hundred—thirty-three hundred, perhaps; maybe a little over that.

Q. What other property did the company have in the city?

A. Well, had its mains.

Q. That would be included in the forty miles of pipe?

A. Yes, sir.

Q. Was the service-pipe included in the forty miles?

A. No, sir.

Q. Forty miles of pipe?

A. That is, cast-iron mains. I don't know how many miles of service-pipe there was. There may have been as many as four thousand connections.

Q. And the company owned those?

119 A. Yes, sir; owns them yet.

Q. What other property did you have in the city besides that—the service-pipes, the meters, and the mains?

A. We had our office furniture and traps, and shop fixtures, and so on.

Q. Did you have any shops in the city?

A. Yes, sir.

Q. Whereabouts?

A. Had a shop over on Farrar street.

Q. Repair shop?

A. Yes, sir; and our offices there.

Q. That includes all the property that you had in the city?

A. Yes, sir.

Q. You purchased from the old company all of the mains, service-pipe, and meters of that company east of Woodward avenue?

A. We traded for them and obtained them—yes, sir.

Q. Under this agreement?

A. Yes, sir.

Q. And also gas-holders?

A. Yes, sir; and land.

Q. The land on which the gas-holder is situated?

A. Yes, sir.

Q. So that, with these additions, that is the property owned by the company now in the city?

A. No, sir; we exchanged some property included in my former statement for what was obtained.

Q. The pipes, meters, etc., on the west side of Woodward avenue?

A. Yes, sir; we exchanged. We sold or exchanged about twelve miles of pipes for about twenty-seven miles, and paid the difference as estimated. It was a swap.

Q. Previous to your agreement, had you laid pipe upon any streets that were not occupied by the old company?

A. A great many.

Q. A considerable number?

A. Yes, sir.

120 Q. Was there a considerable number of such streets west of Woodward avenue?

A. Not many. It was duplicated almost universally; not always, but nearly so.

Q. The only places where it was not duplicated was in crossing from one street to another?

A. No, sir; there were some streets we laid pipe in on the west side that never had any before; I don't remember now which ones; one I think of now was Spencer.

Q. The change was made immediately upon the completion of this agreement?

A. No, sir.

Q. How long a time elapsed?

A. The contract was made about the 28th of June, and the delivery of the property was made on the 28th of July; that is, the mains on that day were cut off and separated on Woodward avenue.

Q. Cut off in the center of Woodward avenue?

A. As far as the consumption on Woodward avenue is concerned, it would not make any difference where it was cut off.

Q. You connected your pipe and mains with the pipes of the old company?

A. No; did not then.

Q. Do you use both sets of pipe?

A. No; we use some of both.

Q. In some streets you use both pipes, in some you do not?

A. No; in the course of time we will have all duplicate pipes cut off.

Q. Do you use the old pipe at all?

A. No, sir; we have left it in the ground so far.

Q. Although you don't use it?

A. Don't use it; it is lying there dead.

Q. Calculate to take them out?

A. We may, some time, some of it; some we may not. Some would cost more to dig out than it would to buy the pipe new—considerably. If there was anything to be made by digging them up over buying new pipe, we would dig them up.

121 Q. You have dug up some?

A. Where?

Q. I asked you.

A. Oh, I thought you said we had. There might be a few we have. As to digging up pipe as a matter of utility, we haven't done it yet. You will understand the reason.

Q. I understand the reason to be, it won't pay.

Mr. CONELY. In this trade, was not an estimate put upon the value of the pipe that you took from the old company?

A. Yes, sir. I estimated before I would tell them how much boot we would give.

Q. You figured it in as though it were of so much value?

A. As though there had to be new pipe put in. If you have any curiosity to know, there is the paper on which the bid was made. They said generally it was very fairly done.

Q. All I want to get at is, that in making the trade the old company were allowed a material value for the pipes that were lying there?

A. This is our offer right at the bottom (produces a paper); that is the offer. At the bottom is the difference in favor of valuation of the old company.

The further hearing of this case is adjourned until Thursday, the 7th day of March, at 10 a. m.

The circuit court of the United States for the eastern district of Michigan.

THOMPSON DEAN
vs.
THE CITY OF DETROIT.

APRIL 13TH.

Complainant introduces in evidence an extract from the Detroit Free Press, under date of July 10th, 1877, the same being an article entitled "About Gas."

(The counsel for the defendant objects to the introduction of the article in question, as irrelevant and immaterial.)

122 The article is as follows: "Proposals for lighting the city with gas were opened by the controller yesterday. The Detroit Gas Light Company offers to light the city hall and central market for two dollars per thousand feet of gas, and the Mutual Gas Light Company for $2.25 per thousand. The bid of both companies for lighting the streets was $1.87½ per thousand. Under the compromise recently agreed upon by these two companies, the Detroit will confine its operations to the west side of Woodward avenue, while the Mutual has a clear field in all that portion of the city east of Woodward avenue. Both have raised the price of gas for consumption to $2.50 per thousand feet, with 25 per cent. off if paid at the Mutual office on or before the 15th, and at the Detroit office on or before the 10th, when bills are rendered. The work of changing the pipes is already under way. It is reported that the Mutual Company paid the old company $100,000 as an inducement to agree to the division of the territory."

The complainant also offered in evidence from the Free Press, of August 3d, 1877, on the first page, the following article, entitled "A Gassy Dicker":

"There was filed for record in the office of the register of deeds, yesterday, a deed of conveyance of all the property of the Detroit Gas-Light Company in the eastern part of the city, being the reservoir at Chene street, etc., to the Mutual Gas Light Company, for $140,000. The deed contains a clause that no part of the premises conveyed should be used for the manufacture of gas."

The complainant also offered in evidence the following article from the Detroit Evening News, of July 2d, 1877:

"The two companies have at last come to an understanding. They have agreed to cease cutting each other's throats, and for the future to apply their respectives knives to the throats of consumers, by charging an uniform rate to private parties of $2.50 per thousand feet, 25 cents per thousand feet off if paid before the 10th of the month. Notices are now being served by both companies to this effect."

123 The complainant also offers in evidence the following article from the Detroit Evening News, under date of July 9th:

"This morning the controller received bids for furnishing the city with gas. The Mutual Company will furnish it for the city hall at $2.20 per thousand cubic feet, and for the street lamps charge $1.87½. The Detroit Company will furnish the city hall for $2, and the street lamps for $1.87½. It will be seen the two bids are virtually the same, the amount of gas consumed in the city hall being comparatively small, but the Detroit Company will be entitled to the contract, because of its lower bid for the city hall. Both companies have refused to bid for furnishing gas by the lamp for the streets, which they were

requested to do in the controller's advertisement. Both of them, however, informed the controller that they would submit bids in that way on condition of their being allowed to attend the lighting of the lamps themselves. The Mutual Company informally agrees to keep the lamps burning for 2,250 hours during the year, the number of hours which, according to the gas inspector, the lights are now kept burning, for $18 per lamp, $1 less than the price bid by the Naptha Company. It is understood that should the Detroit Company get the contract, it will contract with the Mutual Company to light half the lamps, allowing them the full price received from the city for all the gas furnished by them."

The complainant then offered in evidence an extract from the same paper, under date of July 12th, which is as follows:

"In the ordinance amending the charter of the Mutual Gas Light Company there are two sections providing strictly against a possible collusion between it and the old Detroit Company and against a consolidation of the companies, but as usual in all such cases, the chartering power of the council went too far, and made a contract so clearly one-sided and arbitrary as to render it legally imperfect, if not void. The very penalties provided by the council to protect the citizens will probably in the end prove only additional levers in the hands of the company for purposes of extortion. President Fitch, of the Mutual Gas Company, only laughs at the awkwardly con-
124 structed ordinance, which provides, as it does inferentially in one instance, that in case the company fails to keep the snow off of the sidewalk in front of its business office it shall forfeit, not only its charter, but the whole of its $300,000 worth of property to the city. Mr. Fitch frankly confesses that in 1872 his company offered the old company $200,000 to give up certain territory, and that the offer was rejected. He also makes it appear that some such purchase as the above has been made. This, it appears, the Mutual Company had a right to do, even under the strictest interpretation of their charter, which forbids them to sell it, but makes no provision against a purchase. Very few people who know anything about the matter have any doubt that the city or citizens have any rights which the Mutual Gas Company can be compelled to respect."

The complainant offered in evidence an article from the same paper under date of July 20th, respecting the controller's opening of bids for gas, which is as follows:

"This morning the controller opened the third set of bids for lighting the city with gas. That of the Detroit Company offers to light the city hall and public buildings at $2 per thousand cubic feet. They also propose to light the street lamps at $1.87½ per thousand cubic feet. Both of these bids are in accordance with the terms of the advertisement, which calls for gas of 16-candle power and two and a half inch pressure. They put in a third bid, which is, that they will furnish gas, clean, light, and extinguish the lamps at the rate of $18 per post, the gas to be equal in power to the naphtha lamps. This last condition is not in accordance with the condition of the advertisement. The Mutual Company offers to furnish gas for the city hall and public buildings at $2.25 per thousand cubic feet, and to furnish street lamps at $1.87½ per thousand cubic feet, according to the specifications of the advertisement. President Fitch, of the Mutual Company, then submits a long voluntary proposition, after stating that he does not see any material difference in the conditions of the last advertisement for bids over the one that preceded it. His voluntary proposition is to furnish the street lamps with

125 gas of as good quality as is used in the principal cities and towns in the country, light and extinguish the lamps and keep them as clean as practicable, for $18 per post, at the rate of 2,250 hours per annum, the company to have complete control of the lamp lighters, with the power to hire and discharge and regulate wages. He says the company would not expect to be paid unless the duty was properly performed, and that if one or more lamps were not lighted the difference would be detected and the company notified at once of the neglect. This last bid is not in compliance with the requirement of the advertisement, and, like the last one of the Detroit Company, cannot be considered by the council. President Fitch, in one portion of his communication, broadly insinuates that the conditions of the advertisement are not good common sense. His bid is a long-winded affair and exhibits a little bad blood."

Complainant then offers in evidence an article from the same paper under date of August 3d, 1877, which is as follows:

"The Detroit Gas Light Company have sold their real estate and gas meter on Chene street, as well as all their mains and pipes east of Woodward avenue, to the Mutual Gas Light Company, for $140,000. Six years ago, when the new company was organized, they offered $275,000. It paid the Mutual to hang on, and the Detroit lost considerable by it."

Complainant offered in evidence an article from the Detroit Daily Post, under date of July 2d, 1877, under the head of "Gas":

"The days of cheap gas in Detroit are ended. The price goes up, and the companies show a tendency to dwell together in peace and harmony. Both of the gas companies are notifying their customers that on and after to-day the price of gas will be two dollars and fifty cents per thousand cubic feet, or $2.25 if paid by the 10th of the month. This will be the uniform price in all parts of the city, and there will be no exceptions or favored individuals, or favored localities. Persons who have been getting their gas for the past four or five years at fifty cents per thousand feet may be sorry to read this announcement, but they may console themselves with the reflection that in many instances their gas bills
126 during that period have not amounted to enough to pay the interest on the cost of the material, to say nothing about the connections and other services rendered them free of charge; but the companies have got tired of furnishing gas at less than cost, however willing the public may be to consume gas on those terms. It has been evident for some time that things could not go on in the old way many months; and there has been a general belief that the time would soon come when the companies would strike hands and the price of gas would go up high enough to cover the losses of past years and line the pockets of stockholders with good round dividends. The public, however, will be gratified to know that the companies still show a disposition to keep prices below what they are authorized by their charters to charge. People will be very well satisfied to pay two dollars and a quarter. It is a fair price, affording only a reasonable profit on the manufacture. It is about one dollar less than the companies might have charged if they had chosen to go to the limit fixed by their charters. There is a well-defined rumor that the two companies have come to terms. The officers deny that any arrangement has been entered into, and while it may be true that the nuptial ceremony has not been actually performed, it is certain that there exists that delicious secret which the pair think they will have all to themselves, and the existence of which they cannot imagine how anybody could have suspected. At the same time they admit that some coquetting has been going on for a year or more, and

that already there has been quite serious talk, with allusions to dower and setting up housekeeping. When a couple gets to this pass, everybody knows what is sure to follow. The officers say that the probability—mind, they do not say the arrangement has been consummated—is that the city will be divided by Woodward avenue, the old company taking that part west of the avenue, and the new company the eastern portion. An appraisal will be made of the value of the property owned by each company in each district, and each will buy out the other in its own district. The final consummation of this arrangement
127 will require the digging of a ditch from the river to the northern limits of the city and cutting off and plugging up every intersecting gas-pipe, and none must be overlooked, for thereby one company would be getting pay for gas furnished by the other; therefore the work of cutting off the pipes will be carefully attended to. The public may soon expect to see the streets dug up for this purpose. By this division of the city the terms and provisions of the charter of each company, so far as the public is concerned, will be assumed by vote. The citizens of either district will therefore lose no favorable provision in the charter of the company which takes the other division. All these provisions will be construed for the benefit of the people of the whole city."

The complainant also introduced in evidence an extract from the Detroit Daily Post, under date of July 18th, 1877, which is as follows:

"Laborers are busy on Woodward avenue at all the cross-streets cutting off the gas-pipes and plugging them up. This is in pursuance of the combination by which the Mutual Company is hereafter to supply the eastern portion of the city and the Detroit Company the western."

Also the following from the Detroit Post of July 21st, 1877:

"By the recent arrangement between the gas companies the Mutual Company takes the Chene-street reservoir, and is now connecting its mains therewith."

MAY 1ST, 1878.

PETER E. DE MILL called and sworn.

Examined by Mr. BAKER:

Q. How long have you been a citizen of the city of Detroit?

A. In September it will be 48 years; I came here in 1830.

Q. Did you at any time have any business connection with the Detroit Gas Light Company?

A. I did, sir.

128 Q. What position, if any, did you occupy in the company?

A. I was the secretary in 1851—from 1851 up to 1877, May, 1877.

Q. Do you remember when the Mutual Gas Light Company was organized?

A. I do; that is—no, I don't remember when it was organized.

Q. Do you remember when the promoters of the company came here to——

A. To apply for an ordinance? Yes, sir; in the fall of 1871.

Q. Before the fall of 1871 how many gas companies were there doing business in the city of Detroit?

A. One.

Q. The Detroit Gas Light Company?

A. The Detroit Gas Light Company.

Q. Do you remember what the Detroit Gas Light Company, during the summer of 1871, charged for gas?

A. No, I don't; I don't remember the price for that particular year.

Mr. MEDDAUGH. You can ascertain that from their books.

A. They varied their rates.

Q. In the winter of 1871–'2, do you remember of any negotiations between the Detroit Gas Light Company and the Mutual Gas Light Company?

A. I think in February, 1872, there was an effort to negotiate made—expected to have been made.

Q. Well, negotiations were carried on between the people connected with the two companies?

A. Yes, sir; that was in February.

Q. In February, 1872?

A. In February, 1872.

Q. Will you state the nature of those negotiations; what was sought to be accomplished by it?

(Objected to as irrelevant.)

129 A. The effort was to arrive at a fixed price for gas, so we should not lose money by competition, of course, and the intention was to divide the city by the center of Woodward avenue.

Q. Were any written propositions submitted to the Detroit Gas Light Company by the Mutual Gas Light Company at that time?

A. Not at that time; there was on the 22d of March, here in Detroit. The conference——

(Same objection to this question as to the preceding one.)

The WITNESS (continuing). The conference between the parties held in New York in February.

Q. Were you present at the conference in New York?

A. I was.

Q. Who did you hold a conference with in New York?

A. With Mr. Fitch, Mr. Kennedy, and with Mr. Dean.

Q. That is, Mr. Fitch——

A. The president of the Mutual Company. Subsequently, on the 22d of March, we returned home here, and Mr. Fitch made a written proposition to us.

Q. Who was that written proposition delivered to?

A. Delivered to me, at my office.

Q. What was done with it?

A. He requested that it should be returned to him (and it was returned to him) if not approved.

Q. That is, if the proposition was not accepted by the Detroit Company, the written proposition made by him should be returned to him?

A. To be returned.

Q. Did you so return it?

A. I did.

Q. Did you keep a copy of it?

A. I did.

Q. Have you that copy?

A. Yes, sir.

Q. Produce it.

(The witness here produces a paper which is marked Exhibit "A 1," of which the following is a copy:)

130 (Copy.)

DETROIT, MICH., 22 *March*, '72.

"GENTLEMAN: Referring to conferences heretofore had between representatives of your company and ourselves and associates, both in New York and in this city, believing that if the same is accepted by your body, and approved by your stockholders, it will be approved and confirmed by our co-stockholders, when submitted to them, we propose to purchase the street mains, meters, services, holders, etc., heretofore considered, and to pay for the pipe at the following rates for each size and condition; and, for the purpose of showing upon what basis we arrive at the price offered per lineal foot, we itemize the same, to wit:

"For pipe under Nicholson or other wood pavement: 12-inch pipe, $1.82; lead and gasket, 14c.; pavement, 35c.; French 'A' filling, 14c.; laying, $5; $2.50 per foot. 10-inch pipe, $1.48; lead and gasket, 10c.; pavement, 33⅓c.; French 'A' filling, 14c.; laying, $4.00; $2.09⅓ per foot. 8-inch pipe, $1.16; lead and gasket, 8c.; pavement, 28c.; French 'A' filling, 14c.; laying, $3.00; $1.69 per foot. 6-inch pipe, 79¼c.; lead and gasket, 6c.; pavement, 28c.; French 'A' filling, 14c.; laying, $3.00; $1.30¼ per foot. 4-inch pipe, 48½c.; lead and gasket, 4c.; pavement, 25c.; French 'A' filling, 14c.; laying, $2.00; 93½c. per foot. 3-inch pipe, 36c.; lead and gasket, 2c.; pavement, 25c.; French 'A' filling, 14c.; laying, $1.66⅔; 78⅔c. per foot.

"For pipe under cobble-stone pavement: 12-inch pipe, $1.82; lead and gasket, 14c.; pavement, 13⅓c.; French 'A' filling, 14c.; laying, $5.00; $2.28⅓ per foot. 10-inch pipe, $1.48; lead and gasket, 10c.; pavement, 13⅓c.; French 'A' filling, 14c.; laying, $4.00; $1.89⅓ per foot. 8-inch pipe, $1.16, lead and gasket, 8c.; pavement, 11⅔c.; French 'A' filling, 14c.; laying, $3.00; $1.52⅔ per foot. 6-inch pipe, 79¼c.; lead and gasket, 6c.; pavement, 11⅓c.; French 'A' filling, 14c.; laying, $3.00; $1.13¾ per foot. 4-inch pipe, 48½c.; lead and gasket, 4c.; pavement,
131 10c.; French 'A' filling, 14c.; laying, $2.00; 78½c. per foot. 3-inch pipe, 35c.; lead and gasket, 2c.; pavement, 10c.; French 'A' filling, 14c.; laying, 1.66⅔; 63⅔c. per foot.

"For pipe not under pavement: 12-inch pipe, $1.82; lead and gasket, 14c.; French 'A' filling, 14c.; laying, $5.00; $2.15 per foot. 10-inch pipe, $1.48; lead and gasket, 10c.; French 'A' filling, 14c.; laying, $4.00; $1.76 per foot. 8-inch pipe, $1.16; lead and gasket, 8c.; French 'A' filling, 14c.; laying, $3.00; $1.41 per foot. 6-inch pipe, 79¼c.; lead and gasket, 6c.; French 'A' filling, 14c.; laying, $3.00; $1.02¼ per foot. 4-inch pipe, 48½c.; lead and gasket, 4c.; French 'A' filling, 14c.; laying, $2.00; 68½c. per foot. 3-inch pipe, 36c.; lead and gasket, 2c.; French 'A' filling, 14c., laying, $1.62⅔ 58⅔c.; per foot.

"For drayage on pipe from dock to streets where laid: One dollar and fifty cents per ton.

"For holder, real estate, etc., and for lots and tenements: The appraisement of three disinterested citizens, mutually chosen.

"For excavation, grading, brick, and stone work: What was paid for same, with advance, if any, on price of brick used.

"For iron-work: What was paid for same—with the advance on iron added—per pound of weight of each kind and description used.

"For boilers, valves, exhausters, etc.: Present price for similar articles placed in position in Detroit for use, or what was paid for same, if preferred.

"For service-pipes connecting with buildings using gas-light, or laid to connect with buildings: Five dollars each.

"For meters: Same as heretofore proposed.

"For salary of engineer, superintending laying of pipes, building holder, contracting for same, etc. (eight months): Four thousand dollars.

"This proposition is made in good faith, believing that we have made liberal estimates of cost of putting pipe in the ground; but if it can be shown that we have undervalued the cost of any particular item named, we will so modify our figures as to make the same correct. What we desire to offer is present cost of pipe, if laid now, and present value of the other articles named—located and ready for use.

132 "We do not propose to offer, nor will we pay, any bonus beyond that embraced in classing old mains to the extent they exist as equal new ones.

"Unless accepted this day, please return the same, and with it consider all propositions made by us or our associates withdrawn.

"Very respectfully, your obedient servants,

"A. C. RAND,
"WM. H. FITCH, JR.

"To Messrs. De Mill and Taylor, representing the board of directors of the Detroit Gas Light Company."

Q. State whether you compared this copy with the original.

A. I did.

Q. Is it a true and correct copy?

A. Yes, sir; it is copied in the handwriting of Mr. Morse, one of my clerks.

(The paper is offered in evidence.

Objected to as incompetent and irrelevant.)

Q. Will you state what occurred at the meeting in New York?

(Objected to as immaterial and irrelevant.)

A. We met in the Fifth Avenue Hotel there—the gentlemen I have named—for the purpose of negotiating an arrangement, as I said before, that the companies could make money at, and an arrangement was perfected as to division line and as to price.

Q. What do you mean by "division line"; dividing the city?

A. Dividing the city on Woodward avenue.

Q. What line was agreed upon?

A. The center of Woodward avenue.

Q. What, if anything, was agreed upon in regard to a sale by either company to the other of its pipes, mains, and other property?

(Same objection.)

A. They had no pipes at that time.

Q. What was the proposition and agreement?

133 A. They were to buy our pipe east of Woodward avenue.

Q. Had they at that time laid any pipe in the city?

A. No, sir, not a foot; the matter of course would have to be concurred in. Whatever arrangement was made would have to have the consent of the stockholders.

Q. Of your company?

A. Of our company, of course; we supposed, likewise, that Mr. Dean owned the other, and of course that was satisfactory to himself. We left in the afternoon of Monday, and went to Philadelphia, to confer with a large portion of our stock there, and they consented and agreed to the price, and the understanding was $275,000, while they

thought we ought to have more of course; but still we conferred with them, and their impression was to accept the $275,000, and get $300,000 if we could; that is the mere naked statement of the matter. Of course we told them we would do so, and we returned home under the impression that the thing was satisfactory to our stock—at least the majority of them—that would have to confirm it; and after we got home, on the 22d of March, Mr. Fitch, after some conference, some objection of our members, I can't say who, Mr. Fitch sent in this proposition of what he would do on the 22d; what hewould pay for the various sizes; how much per lineal foot, etc.: that was agreed upon. In the meantime, during that time, the stockholders in Philadelphia had an idea we were giving away too much; the sale of 47,000,000 of gas for nothing—in case it was ten per cent, it would be $47,000; so they went back on us—on the committee's arrangement—and concluded they would rather fight than do it; so we could not accept this proposition, and did not accept; so the competition went on. That was the last of any negotiations I knew of.

Q. Do you remember about when the Mutual Company began the manufacture and sale of gas here?

A. I think it was the 21st or 22d of November, 1872.

Q. State what occurred from that time down to 1877, in regard to competition between the two companies for the price of gas?

134 A. Well, for the first—let us see—November, December, January—well, nearly three months we charged the same rate for gas that we had been charging; I think we had about thirty-seven hundred consumers, and I think we lost about eight hundred consumers on the line of pipe where there was competition; and in about three months, along in February or March following the start, there were about one hundred and twelve that came back to the old company, and that looked rather encouraging to us, of course. If they went away from us because we had been ugly——

(Objected to, as incompetent and immaterial.)

Q. Just state what occurred.

A. It occurred like this, that when they began to come back, they began to cut on price.

Q. What was their first reduction? What did they cut their prices to?

(Objected to as immaterial.)

A. I could not state; I don't remember; the books will tell that; I can't remember now.

Q. State whether or not they maintained an active competition with your company until the summer of 1877?

A. Yes, sir.

(Objected to as immaterial.)

The WITNESS. There were communications from Mr. Fitch to the public.

Q. We don't care anything about that. Did you have anything to do with the final negotiations by which the city was divided?

A. No, sir; nothing at all. If I had had control of the stock of the gas-light company, I never would have done it.

Q. Is this the only written proposition that was received from the Mutual Company by your company, to your knowledge?

A. To my knowledge.

Q. I understand you, when they got finally started in the spring of 1873, some of your customers came back to you?

A. 1872.

135 Q. 1873 it would be, would it not?

A. 1873; yes, sir.

Q. The Mutual Company reduced the prices of gas on the lines of streets where both companies had pipes?

A. Yes, sir; put agents on the street; solicited custom.

Q. And they maintained an active competition with your company to 1877?

A. Yes, sir.

Q. In this conference in the city of New York, or at any other conference between the officers connected with the two companies, was any proposition ever made or considered in regard to your company paying them anything in order to induce them not to come here to go into business?

(Objected to as irrelevant and immaterial.)

A. I don't know positively.

Q. You have no knowledge yourself?

A. No, sir.

Q. Was any such proposition ever made to you?

A. No, sir.

Q. Who was present with you in New York on behalf of your company?

A. Mr. Dey.

Q. A. H. Dey, the banker?

A. A. H. Dey. He was then president of the company; Elisha Taylor and Henry Cartwright, of Philadelphia. He was then a member of the board of directors.

Q. Will you state what gas can be manufactured and sold for at the present time, with a fair profit?

(Objected to as immaterial and irrelevant.)

Q. You are familiar with the business?

A. I am somewhat familiar.

Mr. MEDDAUGH. We won't question that.

A. There ought to be a satisfactory profit at a net price of $1.80.

Q. Will you state whether down to 1877 the Mutual Company laid any considerable quantity of pipe west of Woodward avenue?

136 A. They had not.

Mr. MEDDAUGH. I don't suppose there is any chance for controversy upon that point.

Cross-examination:

Mr. MEDDAUGH. Negotiations, you say, commenced in the city of Detroit in February?

A. In New York.

Q. Commenced in New York, between the Mutual and Detroit Gas Light Company for some adjustment of the matter of gas in the city of Detroit between them?

A. Yes, sir.

Q. It was continued in March following at Detroit?

A. At Detroit.

Q. Will you state whether the paper you have produced, and which has been put in evidence, and marked Exhibit A 1, embodies the substance of the negotiations between them at Detroit and in New York?

A. Well, it embraces the proposition entire, as Mr. Fitch made it to us on the 22d of March—mainly the same. I have not figured up what the cost would be; it would be some less than that—I mean the price per foot of the different sizes of pipe.

Q. Was there any other branch, feature, or phase of the gas business the subject of negotiation, either at Detroit or in New York, at the conference you speak of, other than that embraced in this paper?

A. No.

Q. You said that gas could be manufactured and sold in Detroit at $1.80 a thousand, at a profit?

A. Yes, sir.

Q. What do you mean?

A. I mean just what I say.

Q. Well, you have not said much—$1.80 per thousand; that proposition is a lame proposition. Do mean anything more than that?

A. Well, I mean this, the amount of gas sold at $1.80 would
137 pay a satisfactory dividend on a capital of the cost of the two works together.

Q. What do you put the cost of the two works at?

A. I should put the cost of the Detroit Gas Light Company at $1,100,000, and that of the Mutual at $500,000; that is to say $1,600,000; that would be pretty high.

Q. How much gas would you have to manufacture and sell at $1.80 a thousand?

A. You could build works more than equal to the present ones; that is, you could build gas works for $1,600,000 that would sell 160,000,000 a year.

Q. At $1,800,000?

A. No; $1,600,000.

Q. Then you would put the cost of the works at $1,600,000—the plant, the entire investment of capital?

A. Yes, sir.

Q. And you would supply how much?

A. Well, I would supply 180,000,000.

Q. At $1.80 a thousand?

A. Yes, sir.

Q. What profit do you estimate that would pay?

A. I should estimate it would be eight per cent. I have not figured it.

Q. You are testifying now; do you want to figure it?

A. Well, eight per cent.

Q. You said you did not have anything to do with the final negotiation for the division of territory between these companies in 1877?

A. No.

Q. Were you secretary of the company at that time?

A. No.

Q. In what capacity were you acting?

A. Not any, except as stockholder.

Q. Were you not secretary of the company down to about the time of the division?

A. I was up to May.

Q. May preceding?

138 A. May preceding; and this division was made in June or July.

Q. You took a pretty active part in trying to bring about an adjustment before your retirement.

A. Yes, sir; I am sorry now I did; it has had a very favorable result for Mr. Dean.

Q. What business are you in now?

A. The general lighting of streets with naphtha.

Q. You are running an opposition to both these companies?

A. Yes, sir.

Q. Are you taking a pretty active part in this fight between the Mutual Gas Light Company and the City of Detroit?

A. Yes, sir; I am interested. My business is to get that contract away from both of them, if I can; I don't expect to get it, though.

A. SMITH BAGG called and sworn for defendant.

Mr. BAKER. How long have you lived in Detroit?

A. About 38 years.

Q. Were you a member of the common council in Detroit in 1871?

A. I think I was. Yes, sir.

Q. Do you remember the occasion when the Mutual Gas Light Company obtained an ordinance allowing them to do business in this city?

A. I think I do. Yes, sir.

Q. How was that matter first brought to the attention of the council?

(Objected to as immaterial.)

Q. By petition or otherwise?

A. Well, that is a pretty general question; I could hardly say when first, but I think it was by petition.

Q. Was any committee appointed by the common council to take the matter into consideration?

(Objected to as irrelevant, immaterial, and incompetent.)

A. I think there was.

139 Q. Were you a member of that committee?

A. I think I was.

Q. Will you state whether or not the committee held any meetings at which the matter of granting the prayer of the petition was considered?

A. Well, at this time I can hardly say whether we met as a committee or not; I have a pretty distinct recollection that there was action taken, but whether we were together—I should think likely enough we were together, but still we might not have been; we may have acted separately.

Q. Will you state whether or not this subject was considered by the common council at any of its sessions?

(Objected to as incompetent, immaterial, and irrelevant.)

A. Yes, sir; I think it was considered by the council.

Q. Was the question of passing the ordinance discussed and debated by the different members of the common council?

(Same objection.)

A. It was.

Q. You took quite a prominent part in opposition of the ordinance, did you not?

A. I don't know as I should want to qualify prominent, but I took a pretty active part, I guess.

Q. Will you state what principal argument was advanced by the friends of the ordinance as the reason why it should be passed?

(Objected to as irrelevant and immaterial.)

A. I think the principal argument was that competition would cheapen gas to the city and inhabitants.

Q. Was it suggested or made known in any way that the new company proposed to divide the city with the old company?

(Objected to as immaterial, irrelevant, and leading.)

A. I think it was not to my knowledge.

Q. Was it made known in any way that the new company proposed to sell out to the old company?

(Same objection.)

140 A. On the part of the company asking or the opponents charging that that would be the effect? I would like to understand it.

Q. No; on the part of the company asking, and the friends of the measure—whether that was stated—that that was what they proposed to do?

A. Oh, I think there was no such statement, to my knowledge.

Q. The committee to whom this matter was referred reported upon the subject?

A. Yes, sir; I think they did; yes, sir.

Q. A majority and a minority report?

A. I believe so.

Q. Before this time there had only been one company doing business in Detroit?

A. That was all, I believe.

Q. Will you state whether at that time considerable dissatisfaction existed towards the old company among the people of Detroit?

(Objected to as immaterial and irrelevant.)

A. Well, I could not say as to that. There was, perhaps. I think there were some who objected or found fault with the old company in some of their business relations, but to what extent I could hardly say.

Q. Could you state the substance of the petition that was presented by the new company, asking that the ordinance be passed?

A. I could not.

Q. Do you remember having any conversation with any of the promoters of this new company, Mr. Fitch, Mr. Dean, or Mr. Meddaugh?

A. I had conversations, but I could hardly recall any of them, so as to give a general idea.

Mr. MEDDAUGH. All this testimony is objected to as irrelevant and immaterial.

Q. Can you state whether or not the persons whom I have named, and others connected with the company, urged the passage of this ordinance on the common council?

141 (Same objection.)

A. They and their friends did. They were present, some of the petitioners and some of the promoters and their friends, and they seemed to urge it upon the council.

The counsel for the city introduces in evidence the proceedings of the common council of the city of Detroit, as they appeared in the journal of the common council, relating to the Mutual Gas Light Company, for the year 1871, and in the printed volume of the proceedings, commencing November 15th, 1871, and ending on the 24th day of November, 1871, said proceedings and the dates upon which they occurred, as presented in said journal, being as follows:

"SEPTEMBER 15TH, 1871.

"Petitions presented: Of T. K. Adams and others, for permission to lay pipes in streets, alleys, and public grounds of the city for the purpose of supplying the city and citizens with gas. Referred to a special committee, consisting of Aldermen Wilmot, Bagg, Allison, Folsom, and Hill."

"OCTOBER 6TH, 1871.

"Petitions presented: Of the Detroit Gas Light Company, remon-

strating against permission being granted to another company to lay gas-pipes in the streets of Detroit. Referred to the special committee on new gas company."

"OCTOBER 13TH, 1871.

"Petitions presented: Of F. Buhl and 1,300 others, asking that the Mutual Gas Company be granted permission to lay gas-pipes in the streets. Referred to the special committee heretofore appointed on the subject."

"*Report of special committee.*

"OCTOBER 20TH, 1871

"To the honorable common council:

"GENTLEMEN: The special committee, to whom was referred the petition of a number of resident and eastern capitalists, asking permission to lay gas-pipes and conductors in the streets, avenues, and
142 public grounds of the city, for the purpose of supplying the city and people with gas-light; also the petition of a large portion of our business community, asking that said permission be granted; also the petition of a large number of our citizens, and the communication of the Detroit Gas Light Company, adverse to granting said permission, all of which your committee have given deliberate consideration and careful examination, and respectfully report as follows: That your committee believe that were it practicable for the city government to control and to provide an ample supply of gas-light at prices within the means of all classes, the greater security of life and property insured, by the abolition of lamps and other movable lights, would warrant the enforcement of its use. This end being impracticable, your committee deem it the duty of the city government to do the best attainable service in this direction—that of multiplying the facilities for the use of gas-light by our citizens, and thereby discourage the much more dangerous means of obtaining artificial light.

"Your committee believe there is ample demand for gas-light at present to warrant the establishment of another company and works in the city, and that the same would tend to increase the number of consumers, without regard to other considerations, while the consequent competition and future increase of population would soon so extend the use of gas-light in the city that either of the two companies would do more business than is now done by the present company.

"The city charter, in its provisions that all purchases made for the city exceeding the sum of $200 should be open to competition, is practically a dead letter unless the council make it possible for competitors to offer to supply the public demand for gas-light.

"Your committee have carefully considered the only seemingly plausible objection to the establishment of another gas company which has been presented, that in relation to the temporary disturbance of the pavement, and interference with the pipes already laid; and, notwithstanding your committee find that the existing gas company has the right to remove pavements to lay pipe, and for other neces-
143 sary purposes at pleasure, yet your committee would recommend that such provisions be stipulated in the ordinance so as to obviate this contemplated difficulty.

"Your committee have also inquired as to the practical skill and financial ability of the gentlemen forming the Mutual Gas Light Com-

pany, and feel assured that they earnestly desire the permission asked, for the purpose of executing their propositions to build works and supply gas, and that they have abundant means to do the same. Your committee see, also, an immediate advantage to the people of Detroit generally in the establishment of another gas-works, which, though less important than that of securing competition in the supply of gas-light, yet is of sufficient moment to present as a consideration in part inciting them to action in this behalf. The building of the new gas-works will demand large amounts of building materials manufactured in this city or vicinity, which, with the labor on its works and the laying of its pipes, must greatly enhance the demand for labor, both skilled and unskilled, in our city, and, therefore, the trades-people will share in the advantages to be derived from the expenditures the company must make in our midst in the building of its works and establishing its means of distribution.

"Another consideration, which should not be overlooked in this connection, and which seems to your committee to be entitled to much weight in favor of granting the request of the petitioners, arises from the present rapid growth of our city, and the certainty that its limits will, within a very brief period, be extended on the one side so as to embrace a large portion of what is now known as Springwells, and on the other so as to include a considerable part of Hamtramck, with a like extension of the northern limits of the city. Such extension will demand of this body such legislative (?) action as will secure to residents in sparsely-settled districts the proper facilities for gas-light in all cases where it may be reasonable that it should be supplied. The existing company is entirely independent of the action or control of this council in such case, and, being controlled in all its actions 144 by the sole consideration of its pecuniary interests, without the wholesome influence of a competing company to stimulate a feeling of regard for public favor and private good will, nothing can be hoped for from it in the way of public or private accommodation that does not promise immediate returns in the form of pecuniary profits. This is no reflection upon the managers of the existing company, but is simply a recognition of well-settled laws of business and of human nature. The existence of another source of gas-supply in our city will tend greatly to remedy this. As competition always begets an accommodating spirit toward the patrons of the competitors, public and private patronage will be sought by means of cultivating a feeling of general good-will.

"In view of these and many other considerations that might be urged in favor of encouraging competition in the supply of gas-light, your committee beg leave to herewith submit an ordinance granting the privileges sought, under such restrictions and conditions as have been deemed advisable to protect the interests of the city and its citizens.

"All of which is respectfully submitted.

"WILLIAM WILMOT.
"PETER HILL.

"I have read and heartily approve of this report.

"S. FOLSOM."

"An ordinance to permit certain persons to lay gas-pipes, mains, conductors, and service-pipes in the streets, alleys, lanes, avenues, squares, parks, and public grounds of the city of Detroit; to establish a manufactory of and to vend gas-light in the said city.

"Whereas David Preston, H. Moffat, T. K. Adams, Robert Hosie, J. F. Antisdel, Ransom Curtis, H. C. Hodges, Philip Thurber, E. Kanter, J. Heffron, H. Weber, A. Wilkins, Thompson Dean, John P. Kennedy, and William H. Fitch, jr., their associates and successors, propose to organize as a body politic and corporate, under 'An act
145 to authorize the formation of gas-light companies,' approved February 12th, 1855 (Laws of 1855, page 243), and act or acts amendatory thereto, for the purpose of building and operating gas-works in the city of Detroit, the said corporation to be known as the 'Mutual Gas Light Company' of the city of Detroit: therefore it is hereby ordained and enacted by the common council of the city of Detroit:

"SECTION 1. That consent, permission and authority are hereby given, granted, and duly vested in David Preston, H. Moffat, T. K. Adams, Robert Hosie, J. F. Antisdel, Ransom Curtis, H. C. Hodges, Philip Thurber, E. Kanter, J. Heffron, H. Weber, A. Wilkins, Thompson Dean, John P. Kennedy, William H. Fitch, jr., and their associates, their successors and assigns, organized into a corporation under the laws of the State of Michigan as aforesaid, to lay gas-pipes, mains, conductors, and service-pipes in any of the avenues, streets, lanes, highways, alleys, public parks or squares thoughout said city, subject, however, at all times, to any and all restrictions and regulations imposed upon the 'Detroit Gas Light Company,' and the following, to wit:

"1. The said corporation shall do no permanent injury to any street, alley, avenue, square, or park; but when they shall open ground in the same to lay any pipe, or for any other purpose whatever, they shall restore, without unnecessary delay, the streets, pavements, sidewalks or ground to a condition equally as good as before.

"2. The said corporation shall open or incumber no more of any street, avenue, alley, or public ground at any one time, or in any one place than may be strictly necessary to enable them to proceed with advantage in the work of supplying private or public demand for gas-light; nor shall any street, avenue, or alley be allowed to remain open or incumbered for a longer period than shall be necessary to execute the work for which the same shall have been opened.

"3. The said corporation shall be liable to compensate the city of Detroit for all damages which may result from or by reason of their having opened or incumbered any street, avenue, alley, sidewalk, or public grounds in said city of Detroit.

146 "SEC. 2. It is further expressly enacted, that if the said corporation shall not have proceeded in good faith under this ordinance to build and establish gas-works in the city aforesaid, and be in condition for manufacturing gas in large quantities within one year from the passage of this ordinance, or if it shall at any time sell to the existing gas-company their property, franchise, and privileges, or shall enter into any combination with said company respecting the rates to be charged for gas, either to public or private consumers, then, in that case, this grant, permission, and authority shall cease and determine, and said corporation shall thereafter claim or have no right thereunder.

"SEC. 3. While there exists competition in the supply and sale of gas-light in the said city of Detroit, the said corporation shall have the

privilege of supplying it at such rates less than at present charged by the Detroit Gas Light Company, as may be agreed upon between it and consumers, public or private; but should said corporation, from any cause, be left without competition, they should, in no instance, nor under any circumstances whatever, charge either public or private consumers higher rates for the supply of light than an averave of the rates charged such public and private consumers, and paid in the cities of Buffalo, Chicago, Cleveland, and Toledo.

"SEC. 4. It is further enacted, that in all streets sparsely built up, where the said corporation shall not elect to lay pipe, and shall not have so laid pipe, within two years from the passage of this ordinance, upon application being made at the office of said Mutual Gas Light Company by occupants of buildings on such streets for supplies of gas-light, averaging one building, store, shop, or residence to every two hundred feet of mainpipe required to supply the same, the necessary extension of mains shall be made, the city authorities having added thereto orders for lamp-post service in the usual proportion on such extension of mains.

"SEC. 5. The said corporation shall supply gas-light under uniform and sufficient pressure between sunset and sunrise, and the qual-
147 ity of the same shall be as nearly uniform as practicable, averaging for each month not less than 16 candles, to be determined by authorized photometrical tests.

"SEC. 6. Within sixty days after the approval of this ordinance, the said grantees shall perfect their incorporation with the full sum of $500,000 of capital stock subscribed, and their articles of association shall be filed in accordance with the law in such cases made and provided, and the said corporation so formed shall execute good and acceptable bonds to the city of Detroit in the sum of $50,000, conditioned to perform the obligations imposed upon it by section two of this ordinance.

"SEC. 7. This ordinance shall take immediate effect.

"Accepted and laid on the table."

"*Minority report.*

"OCTOBER 24*th*, 1871.

"To the honorable the common council:

"GENTLEMEN: The undersigned, a minority of a special committee, to whom was referred the petition of a number of residents and eastern capitalists, praying the consent of the council to the laying of gas-pipes in this city, together with sundry other petitions on the same subject, respectfully report that they dissent from the conclusions of a majority of said committee, and are against granting the prayer of said petition, and the reporting of any such ordinance as that accompanying the report of the majority.

"Firstly. We are by no means satisfied that it has been made to appear that there is a demand for any new company, and, as at present advised, from any representation of said petitioners, we scarcely feel warranted in submitting our opinion that any such necessity exists.

"Secondly. We feel no doubt that the persons representing the proposed future organization intend to use in the manufacture of gas a destructive substance known as naphtha, and we feel it our duty to protest against the introduction into our city of this terrible agent; this reason alone would determine us against the report of the majority.

148 "Thirdly. We are credibly informed, and believe it to be true, that the petitioners will permit the control of their proposed company to pass into the hands of eastern men, whereas any profits which may arise from the sale of gas ought to be reaped by our own citizens.

"Fourthly. We have looked into the statute authorizing the formation of gas companies, and especially the section conferring upon such companies the right to lay gas-conductors in the streets, with the consent of the municipal authorities; and it seems to us, not being lawyers, that the legislature has granted the power of using the streets for such purpose to corporations only, and not to individuals who may propose to combine into a corporation; and that consent by ordinance can be given only to such corporation. We have also taken legal advice upon this subject. We submit that the ordinance reported by the majority, giving consent to certain individuals is of no validity whatsoever. Under the letter and spirit of a proper construction of paragraph 1764 on this subject, found in 1 C. Laws, p. 562, as follows: 'Any corporation formed under this act, shall have power to lay conductors for conducting gas through the streets of any city where such corporation is located, with the consent of the municipal authorities of said city, under such reasonable regulations as they may prescribe.'

"Upon the letter of this statute, it is clear that it is only a 'corporation' which has been 'formed' and 'located,' which can be clothed with power by the consent of the city, to lay pipes.

"Such power or consent cannot be given to any number of natural persons who may apply for it. The city cannot grant such power to Caleb Ives, William H. Tefft, and James S. Gibbs, nor to David Preston and Alvin Wilkins.

"It follows necessarily that the mere fact that such natural persons claim or promise that at some future time they will create a corporation, does not enlarge the statute or give the city authority to give consent to any number of separate individuals.

149 "Nay, more. Suppose a corporation has already been formed and located, the council cannot give its consent to the separate and individual members of such corporation by name, so as to give power to them as a collective body to lay pipes, etc.

"Nor would the separate and individual assent of its members to any contract or 'reasonable regulation' bind the corporation.

"It is the body which must ask and receive power to lay pipes; the body formed, and having a local habitation and a name.

"Consequently the first and all the sections of the ordinance reported granting power to lay pipes to certain individuals who 'propose' to organize as a body politic, and imposing conditions upon such corporation requiring assent, are void.

"It is as if the council should appoint somebody not yet born one of its subordinate officers upon the promise of expecting parents that the boy should be ready within 50 days.

"An artificial person, not in existence, can no more receive such power than a natural person not in existence.

"Suppose gas-light corporations were created by special charter, instead of under a general law, would the council entertain the proposition of giving such consent to certain individuals who should state merely that they intended to petition the legislature for a charter? Clearly not.

"And if they did, would the corporation subsequently chartered

have any legal rights under the power previously attempted to be given to the individuals before their incorporation?

"To state such a proposition is to answer it in the negative.

"It is only the legal and artificial person, instituted for several natural persons, which can receive the power and contract the obligation.

"The franchise to be a corporation resides in the individuals exercising the same, and is derived from the legislature.

"The franchise to lay pipes resides in the corporation, and is derived also from the legislature, on the condition of obtaining consent from the council.

150 "The legislature has conferred the right of opening the streets for conveying gas upon any corporation formed for the purpose which shall obtain consent. It is clear that it is only a collective body of men clothed with the franchise to be a corporation, who are clothed with the further franchise to distribute gas, or who can receive a license from the city to enter upon and open the streets for that purpose.

"We therefore report adversely to granting the prayer of said petition.

"Respectfully submitted.

"A. SMITH BAGG.

"Accepted and laid on the table."

"NOVEMBER 17TH, 1871.

"*Unfinished business.*

"Ald. Adams offered the following as a substitute for section 2:

"SECTION 2. In case the said corporation, within one year from the passage of this ordinance, shall not have built and completed gas works in this city sufficiently extensive to enable it to manufacture gas to a reasonable amount, or if it shall at any time enter into any combination with any gas-light company concerning rates to be charged for gas, either to this city or private consumers, then the consent given by this ordinance shall cease, and this ordinance shall become null and void, and the said corporation is hereby expressly forbidden to sell its property, franchises or privileges to any other gas-light company, under the penalty of a forfeiture to this city of its works, mains, and other property, and an acceptance of this ordinance shall be deemed a consent by said corporation that the title to said property shall vest in the city at once in case of such sale.

"Adopted.

"Ald. Bagg moved to amend section 3 by striking out in line four the words 'at present.'

"Carried.

"Ald. Bagg offered the following as a substitute for section 4:

151 "SECTION 4. It is further ordained that in all streets where the said corporation has not laid mains or conductors within two years from the passage of this ordinance, upon petition of at least two applicants or occupants of buildings on such streets for a supply of gas-light averaging two buildings in every 200 feet of main pipe required to supply the same, the company shall, when directed by the common council, lay mains in such streets.

"Adopted.

"Ald. Bagg moved that the ordinance lay upon the table and be printed.

"Ald. Wilmot moved to amend by ordering the ordinance to be read the second time by its title.

"Carried as follows:

"Yeas—Ald. Allison, Christian, Henderson, Hill, Kuhn, O'Keefe, Smith, Sutherland, Welch, Wilmot, and the president—11.

"Nays—Ald. Adams, Bagg, Baxter, Dullea, Foxen, Fulda, Mahony—7.

"Ald. Wilmot moved that the ordinance lay on the table and be presented as amended.

"Carried."

"NOVEMBER 24TH, 1871.

"Rules were suspended to take up the

"THIRD READING OF ORDINANCES.

"Ald. Wilmot moved to take from the table an ordinance to permit certain persons to lay gas-pipes, mains, conductors and service-pipes in the streets, alleys, lanes, avenues, squares, parks, and public grounds of the city of Detroit; to establish a manufactory of and to vend gas-light in the said city.

"Ald. Baxter moved to take up an ordinance in regard to the Detroit Gas Light Company and the prices to be charged for gas.

"The motion of Ald. Baxter did not prevail, as follows:

"Yeas—Ald. Adams, Bagg, Baxter, Christian, Foxen, Sutherland, Welch, and the president—8.

152 "Nays—Ald. Allison, Dullea, Folsom, Fulda, Henderson, Hill, Kuhn, Mahony, O'Keefe, and Wilmot—10.

"The motion of Ald. Wilmot prevailed, and the ordinance was read a third time by sections.

"Ald. Wilmot moved to strike out all after the word 'Detroit,' in line 28, subdivision 3 of section 1, and insert the following:

"Said corporation shall at all times be subject to the city ordinances now in existence, or which may be hereafter passed, relative to the keeping or storing within the city limits of naphtha, petroleum or other inflammable substances; and shall, also, be subject to all ordinances relating to the inspection of gas, gas-meters, and nuisances, and shall be subject to all other ordinances of the city.

"The motion to strike out was carried as folloms:

"Yeas—Ald. Dullea, Folsom, Henderson, Hill, Kuhn, Mahony, O'Keefe, Welch, Wilmot, and the president—10.

"Nays—Ald. Adams, Allison, Bagg, Baxter, Christian, Foxen, Fulda and Sutherland—8.

"The amendment proposed by Ald. Wilmot prevailed.

"Section 1 was further amended by inserting after 'water-pipe,' in line 12, the word 'sewer;' by inserting between 'shall' and 'restore,' in line 14, 'forthwith,' by striking out in line 14 'without unnecessary delay;' by inserting after 'adjacent,' in line 25, the words, 'to the street or alley opened,' and by inserting after 'from,' in line 26, the words 'leaky pipes.'

"Ald. Bagg moved to insert after the word 'amount,' in line three, section 2, the following: 'and shall not have within two years laid gas mains or pipes in the streets of the more sparsely settled portions of the city, where are laid the mains or pipes of the Detroit Gas Light Company.'

"Lost, as follows;

"Yeas—Ald. Adams, Bagg, and Foxen—3.

"Nays—Ald. Allison, Baxter, Christian, Dullea, Folsom, Fulda, Henderson, Hill, Kuhn, Mahony, O'Keefe, Sutherland, Welch, Wilmot, and the president—15.

153 "Ald. Baxter moved to add to section 3, 'Sandusky.'

"Carried.

"Ald. Bagg moved to insert after 'the Detroit Gas Light Company' the following, 'or any other gas-light company doing business in the city.'

"The amendment did not prevail, as follows:

"Yeas—Ald. Adams, Bagg, Baxter, Eoxen, Fulda, and Sutherland—6.

"Nays—Ald. Allison, Christian, Dullea, Folsom, Henderson, Hill, Kuhn, Mahony, O'Keefe, Welch, Wilmot, and the president—12.

"Ald. Adams moved to strike out, in lines four and five, 'but should,' and 'any cause be left without competition, then they.'

"Carried.

"Ald. Wilmot moved to add to section four the following:

"'The common council ordering thereon the usual proportion of lamp-post service.'

"The motion prevailed as follows:

"Yeas—Ald. Allison, Baxter, Christian, Dullea, Folsom, Henderson, Hill, Kuhn, Mahony, O'Keefe, Sutherland, Welch, Wilmot, and the president—14.

"Nays—Ald. Adams, Bagg, Foxen and Fulda—4.

"Ald. Bagg moved to amend by adding to section four, as amended, the following: 'and in case the company neglects to lay mains when directed by the common council, they shall be subject to the forfeiture contained in section two.'

"Carried.

"Ald. Bagg moved to strike out of section five, the words 'to be determined by authorized photometrical tests.'

"The motion did not prevail, as follows:

"Yeas—Ald. Adams, Bagg, and O'Keefe—3.

"Nays—Ald. Allison, Baxter, Christian, Dullea, Folsom, Foxen, Fulda, Henderson, Hill, Kuhn, Mahony, Sutherland, Welch, Wilmot and the president—15.

154 Ald. Wilmot moved to strike out in line five, section six, the word 'fifty,' and insert in lieu thereof the words 'one hundred.'

"Carried.

"Ald. Bagg moved to add to section six the following: 'and all other conditions imposed upon it by this ordinance.'

"Ald. Bagg moved to so amend section seven that it read as follows:

"'SECTION 7. This ordinance shall take effect at the expiration of 60 days from the date of its passage.'

"'Provided said Mutual Gas Light Company shall signify their acceptance of this ordinance and the conditions and regulations therein by writing filed with the city clerk.'

"Ald. Henderson moved to amend the amendment by striking out all after the words 'its passage.'

"Carried, as follows:

"Yeas—Ald. Baxter, Christian, Dullea, Folsom, Henderson, Hill, Kuhn, Mahony, O'Keefe, Sutherland, Welch, and Wilmot—12.

"Nays—Ald. Adams, Allison, Bagg, Foxen, Fulda, and the president—6.

"The amendment as amended was adopted.

"Ald. Adams moved that the council proceed to the regular order of business.

"Ald. Wilmot moved to amend by putting the ordinance upon its passage.

"Carried, as follows:

"Yeas—Ald. Baxter, Christian, Dullea, Folsom, Henderson, Hill, Kuhn, Mahony, O'Keefe, Welch, and Wilmot—11.

"Nays—Ald. Adams, Allison, Bagg, Foxen, Fulda, Sutherland, and the president—7.

"The question being upon the passage of the ordinance, Ald. Folsom moved the previous question.

"The call was sustained as follows:

"Yeas—Ald. Allison, Baxter, Christian, Dullea, Folsom, Foxen, Fulda, Henderson, Hill, Kuhn, Mahony, O'Keefe, Sutherland, Welch, and Wilmot—15.

"Nays—Ald. Adams, Bagg, and the president—3.

155 "The question being, Shall the ordinance now be passed? the ordinance was passed, as follows:

"Yeas—Ald. Baxter, Christian, Dullea, Folsom, Fulda, Henderson, Hill, Kuhn, Mahony, O'Keefe, Sutherland, Welch, and Wilmot—13.

"Nays—Ald. Adams, Allison, Bagg, Foxen, and the president—5."

To the admission in evidence of said proceedings of the common council complainant's counsel objects as immaterial and irrelevant.

SATURDAY, *October 19th*, 1878.

FRED. A. BAKER, sworn for defendant.

Mr. CONELY. You are the city counselor, I believe?

A. Yes, sir.

Q. Will you state whether, if recently, and at what time you have made any examination in the city clerk's office for the original petition presented by T. K. Adams and others, on behalf of the Mutual Gas Light Company, for permission to lay gas-pipes, etc., in the city of Detroit?

A. When I filed the answer in this case I endeavored to find the petition in the clerk's office, but was unable to find it at that time. I don't know how extended a search was made by the city clerk then, but I did not get the original petition, but in examining the files of the Free Press I found what I supposed to be the substance of the petition in the morning edition of September 16th, 1871. Within the last week I have been to the city clerk's office myself, and, in company with the clerk, have made a careful and extended search to find the original petition. The petitions that were presented on the 15th of September, 1871, in the case, in an envelope, and marked with that date, and are in the clerk's office. I examined those carefully, and this petition was not among them, although a record of it is in the journal proceedings of the council. I also examined all the other envelopes for the sessions during the month and some of the time in Octo-

156 ber. This petition was presented on the 15th of September, and a committee reported on it on the 20th of October, and in the course of business in the council the committee would take the petition and might hand it back to the clerk, and they made their report on the 20th, so I examined the petitions on that day and the packages near

there, and was not able to find this petition; and after diligent search there, there being a box of petitions relating to the Mutual Gas Light Company in the office, I examined that thoroughly, and Mr. Dillman examined also to some extent, and we were unable to find this original petition.

Q. That, I suppose, is the substance of the result of your search?

A. Yes, sir.

Q. You have examined the files of the Free Press of September 16th, 1871, do you say?

A. September 16th, 1871, the morning edition of the Free Press gave a statement of the proceedings; they were not the official printers at that time, but published an article as to what had occurred at the council the previous evening, and under the head of "Petitions presented" in that article they gave the substance of this petition, and that statement I have copied from the Free Press, and the following is a correct copy of the language used in the article in the Free Press in regard to that petition:

Mr. MEDDAUGH. To the Free Press article of that petition objection is made that it is irrelevant as well as incompetent, but we waive the production of the paper.

"SEPTEMBER 15TH, 1871.

"Of T. K. Adams and others, constituting the Mutual Gas Light Company, for permission to lay gas-pipes in the city, pledging themselves to build works; to furnish gas at a lower rate than the Detroit Gas Light Company does, within one year; to replace all pavements that may be disturbed in laying pipe, and restore, at its own ex-
157 pense, all streets or grounds opened by it without delay to a condition satisfactory to the council; to be held liable for any damages that may grow out of its opening any street or public ground; to supply a very superior gas-light, and to be restricted in price, in case there is no competition to govern it, to the average of prices charged in other cities situated upon the lakes, and to such further regulations and restrictions as may be agreed upon.

"(Signers)

"T. K. ADAMS.
"HODGES BRO'S.
"T. DEAN.
"J. P. KENNEDY.
"PEN. DEAN.
"H. WEBER.
"EDWARD KANTER.
"WM. H. FITCH, JR.
"G. DOELTZ & BRO.
"E. S. HEINEMAN.
"O. GOLDSMITH.
"J. ANTISDEL."

I also found the original copy of the ordinance reported by the commiteee on the 20th of October, 1871, and that ordinance is, I believe, in the handwriting of Mr. Bowen, who was then a clerk, if I remember rightly, in the office of Meddaugh & Driggs.

The paper is here offered in evidence and marked Exhibit "H. W."

(Objected to as irrelevant and immaterial.)

I also find on file a number of petitions in favor of the granting the passage of the ordinance granting this privilege to the Mutual Gas

Light Company; there was one there that I should judge was as long as Mr. Fitch stated in his testimony, twenty-two yards.

Mr. MEDDAUGH. All this testimony is objected to as irrelevant and immaterial.

The WITNESS. And the heading to that is like the one I produce—the petition with 1,300 names to it; that is the heading of all
158 the petitions; there are two or three of them, and they all have the same printed heading; that I tore off from one of them.

Paper referred to by the witness is here marked Exhibit "H. W. 2," and offered in evidence, and is objected to as irrelevant and immaterial.

The heading is as follows:

"To the honorable the mayor and common council of the city of Detroit:

"Your petitioners, personally interested in the matter herein referred to, respectfully represent to your honorable body that, in their opinion, there exists a growing demand for improved facilities for the lighting of this now great and rapidly increasing city with gas-lights.

"Being informed that a committee of your honorable body have under consideration a petition from gentlemen of assured practical experience and financial ability, associating themselves under the name and style of 'The Mutual Gas Light Company' of the city of Detroit, asking for permission to lay pipes in the streets of the city for the distribution and supplying of illuminating gas, and that said parties express an honest and laudable desire to establish a gas-works and lay pipes of sufficient capacity to meet the growing requirements of our fast-increasing city for light, binding themselves to supply a superior quality of rich and pure gas-light at a less rate than we are now charged: therefore we respectfully petition your honorable body to grant the prayer of the said 'Mutual Gas-Light Company,' or the parties forming the same, under such regulations and requirements as the public good, in the judgment of your honorable body, may require.

"However that competition may be encouraged, we would respectfully request that the said proposed new company be placed on as liberal footing as the one now existing; that, having to contend against the wealth accumulated by its older rival during over twenty years of undisputed monopoly, the new company may not also be discriminated against by exceptionally exacting or burdensome legislation.

"And to this end will your petitioners ever pray."

The circuit court of the United States for the eastern district of Michigan. In equity.

THOMPSON DEAN, COMPL'T,
vs.
THE CITY OF DETROIT ET AL., DEF'T.

The following are admitted facts in this case, and may be treated on the hearing as duly proved, subject only to objection for irrelevancy and immateriality, to wit: That during the past five years The Detroit Free Press, The Detroit Tribune, The Detroit Post, The Detroit Daily News have been daily newspapers, printed in the city of Detroit, and having a general daily circulation therein.

Nov. 1, 1878.

(Sig'd) MEDDAUGH & DRIGGS,
Solicitors for Complainant.

(") WM. C. MAYBURY,
Sol'r for Def't City.

159 *Examiner's certificate.*

I, Herschel Whitaker, special examiner, to whom was referred the above-entitled cause to take proofs, hereby certify that the witnesses whose testimony is hereto appended appeared before me at the times specified in said testimony and were by me severally and duly sworn; that E. W. Meddaugh attended on behalf of the complainant, and F. A. Baker and E. F. Conely appeared for the defendants; that the testimony was taken in shorthand, and that the copy hereto attached and filed in this cause is an exact transcript of the shorthand notes of the testimony and of all the testimony taken in the above-entitled cause.

In testimony whereof I hereunto set my hand this 4th day of November, 1878.

HERSCHEL WHITAKER,
Examiner.

160 *Order pro confesso.*

In the circuit court of the United States for the eastern district of Michigan. In chancery. January, A. D. 1879.

THOMPSON DEAN, COMPLAINANT,
vs.
THE CITY OF DETROIT AND THE MUTUAL GAS LIGHT COMPANY of Detroit, defendants.

On filing due proof of personal service of the subpœna, issued in this cause, on the Mutual Gas Light Company of Detroit, one of the defendants therein, before the return day thereof, and more than one rule day having elapsed since said return day, and said defendant, The Mutual Gas Light Company of Detroit, having failed to appear within the time limited and prescribed by the rules and practice of this court; on motion of Meddaugh & Driggs, solicitors for the complainant, it is ordered that the bill of complaint filed in this cause be, and the same is hereby, taken as confessed by the said defendant.

(Signed) MEDDAUGH & DRIGGS,
Solicitors for Complainant.

(Endorsed:) Entered & filed Jan'y 23d, 1879. A. Mandell, c'k.

161 *Hearing on pleadings & proofs.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court-room, in the city of Detroit, on Wednesday, the twenty-second day of January, in the year one thousand eight hundred and seventy-nine.

Present, honorable Henry B. Brown, district judge.

THOMPSON DEAN, COMPLAINANT,
vs.
THE CITY OF DETROIT AND THE MUTUAL GAS LIGHT COMPANY of Detroit, defendants. } 2241. In equity.

This cause, now coming on to be heard upon pleadings and proofs is argued in part by counsel for the respective parties, and continued for further hearing.

Argument concluded & case submitted.

THOMPSON DEAN, COMPLAINANT,
vs.
THE CITY OF DETROIT AND THE MUTUAL GAS LIGHT COMPANY OF DETROIT, DEFENDANTS.
2241. Jan'y 23d, 1879. In equity.

This cause again coming on to be heard upon pleadings and proofs, the arguments are concluded and the cause submitted.

162 *Opinion of Judge Withey.*

Circuit court of the United States, eastern district of Michigan. In equity.

THOMPSON DEAN
vs.
THE CITY OF DETROIT, AND THE MUTUAL GAS LIGHT COMPANY, et al.
Hearing upon pleadings and proofs.

Messrs. Meddaugh, Pond, and Lothrop, for compl't.
Messrs. Baker & Conely, for Detroit City.
Decision by Withey, judge. March 25th, 1879.

The bill in this case is filed to restrain the City of Detroit from disturbing the "Mutual Gas Light Company," a Michigan corporation, in the possession of its property and use of streets and public grounds within said city. Complainant brings the suit, being a citizen of New York and holder and owner of a large amount of the stock and bonded indebtedness of the company. He applied to the corporation, through its board of directors, to take legal measures to protect its rights and those of stockholders and creditors against threatened injury by the municipal authorities of Detroit, which was declined. Thereupon, Dean brought this suit. The facts give him a right to sue and satisfy the conditions to give this court jurisdiction.

The gas company was organized in December, 1871, with a subscribed capital of $500,000.00, for the term of thirty years, pursuant to
163 an act of the legislature to authorize the formation of gas-light companies. (1 Comp. Laws of 1871, p. 961.)

This law gives to corporations formed under it power to manufacture, sell, and furnish gas in the city where located, and to lay conductors in the streets and public grounds of such city, "with the consent of the municipal authorities of said city under such reasonable regulations as they may prescribe." Upon the application of the promoters of this company the common council of Detroit, by ordinance granted consent and authority to the company to lay gas-pipes in any of the avenues, streets, and public grounds of the city, subject to regulations which were prescribed as to the manner of opening and using streets in laying main and service pipes. There is no claim that such regulations have been violated on the part of the company. But the consenting ordinance contained two other provisions, which the city authorities claim have been violated on the part of the company. In December, 1877, they therefore revoked the consent and authority given by the consenting ordinance, declared forfeited to the city all the company's property, and ordered the comptroller of the city to take possession thereof, to restrain which action on the part of the municipal authorities this suit is brought.

One of the provisions alluded to is, that if the company shall, at any time, "enter into any combination with any gas-light company concerning rates to be charged for gas, either to the city or to private consumers, then the consent given by this ordinance shall cease and this ordinance become null and void."

164 The other provision reads as follows: "And the said corporation is hereby forbidden to sell its property, franchises, or privileges to any other gas-light company, under penalty of forfeiture to this city of its works, mains, and other property, and an acceptance of the ordinance shall be deemed a consent by said corporation that the title of said property shall vest in the city at once in case of such sale."

The gas company duly accepted the terms of the ordinance, erected works, laid mains and service-pipes in the streets, and in November, 1872, commenced to supply gas and has continued to do so wherever its lines have extended.

The "Detroit Gas Light Company," another corporation, had for a long time existed, and was supplying gas within the city at the time of the formation of the "Mutual Gas Light Company." When the latter commenced operations a competition at once sprung up between the two companies, and continued till June, 1877. During that time gas was furnished to consumers at a price not much, if any, above actual cost of production and supply. With a view to remedying such a state of things, the two companies in June, 1877, entered into a contract by which the territory within the city was divided, and thereafter each company was to and has occupied separate and distinct districts. The old company to supply westerly, and new company easterly, of the center line of Woodward avenue. Each sold to the other whatever piping and property it owned lying within the other's territory. It was found that the difference in value of such transferred prop-

165 erty was $140,000.00 in favor of the old company, which sum the Mutual Company agreed to pay to the other.

It was further agreed that neither company should thereafter lay pipe or supply gas within the other's territory except as they should respectively be liable and bound to do. Each company, however, reserved the right to perform any acts and duties in any part of the city which it should be found legally bound to do, and therefore they further agreed that if either one should thereafter supply gas in the other's territory, such other should be entitled to receive the net gain thereof.

It was entering into such contract by the Mutual Company, that the city authorities claim to have been a violation of the consenting ordinance. First. As having been a combination "concerning rates to be charged for gas." Second. As having on the part of the company been a "sale of its property, franchises, or privileges." The single question that will be considered is, whether the Mutual Gas Light Company violated either of those provisions of the consenting ordinance.

It will be assumed that the municipality as an incident of its proprietary control over its highways and public grounds had power to impose terms and conditions to its consent to the use thereof. I shall not consider whether the terms actually imposed upon the gas company was such as the city had a power to impose or could enforce, as I do not reach that question. I shall also assume that when the gas company accepted the terms of the ordinance, erected its works,

166 and occupied the public streets, such provisions, if of any validity, assumed the nature of contract obligations, and hence, that the rights of the parties are to be determined as resting upon

contract and not mere local legislation. This view is adopted from the consideration that a right of property is involved and not the mere right or power of a city to cause private property, which obstructs or is an inconvenience in a public highway, to be summarily removed out of it.

The first branch of inquiry is, whether the Mutual Company has, by its contract with the Detroit Gas Light Company, "entered into a combination concerning rates to be charged for gas, either to the city or to private consumers," by its agreement not to supply gas westerly of Woodward avenue.

Manifestly the contract between the two gas companies is not in terms a combination "concerning rates"; but the claim is made that it is such in effect, because it operates to defeat competition for the time being, and this has the effect to increase the rates charged for gas. Nevertheless, an examination of the contract between the companies shows that each company is at liberty to fix its rates as it sees fit without reference to what the other's rates may be. The Mutual Company is at liberty, notwithstanding the contract, to fix its rates at twenty-five cents per 1,000 feet, while the rates of the other company may be ten times greater. This shows that neither in terms nor in effect is there a "combination concerning rates." The contract is
167 silent on the subject of rates to be charged either to the city or to private consumers. Both companies are left absolutely free by the contract so far as rates are concerned. The most that can justly be claimed as to the effect of the agreement is, that as it does away with competition between the companies, this company can raise its rates without danger of losing its customers. Suppose this company had bought out the other company's works and lines of piping; there is nothing in the consenting ordinance prohibiting such purchase, therefore the company might have purchased, and there would have been no ground of objection on the part of the municipal authorities; and yet the effect of such purchase would have been the same, viz, it would have done away with competition throughout the entire city and leave this company at liberty to raise its rates without danger of losing its customers. There is no just ground for holding that the contract was a combination concerning rates to be charged for gas, either to the city or to private consumers.

The other branch of inquiry relates to the clause which prohibits the gas company selling "its property, franchises, or privileges." Has the company violated that provision by disposing of its gas-pipe lying westerly of Woodward avenue, and excluding itself, provisionally, from operating within such territory?

Inasmuch as the ordinance imposes a forfeiture of loss of property by way of penalty for a violation of this provision, it should be strictly construed. Now, as to "franchises or privileges" held by the
168 gas company by virtue of the laws of the State under which it was organized, there has clearly been no sale, but merely an agreement not to exercise them westerly of Woodward avenue, unless compelled so to do; and a right is expressly reserved in the agreement between the companies to comply with whatever the company is bound to do in that respect. As to the company's property, the sale was of such part thereof as it owned westerly of the avenue. The evidence shows that this did not include its gas-works and a large proportion of its mains and service-pipes, but only such mains and service-pipes as was embraced within the territory mentioned. The company continues to manufacture and supply gas to about one-half of the city,

more or less, and has, since the contract of June, 1877, furnished gas to both the city and to private consumers.

Is selling some of its gas-pipe, used in supplying customers, a sale of "its property?" Such a construction would present the company selling a ton of coal or a ton of its gas-pipes.

The court is of opinion that the intention of the parties in the provision of the ordinance now being considered, was that the gas company should not sell out its works, including pipes, to any other gas-light company. That is to say, should not sell its property to an extent that, under its corporate franchises, it could no longer employ its works to supply gas to the city and to private consumers.

It is further of opinion that no provision of the consenting or-
169 dinance has been violated by the Mutual Gas Light Company; that the municipal authorities of the city of Detroit have not shown any present right to disturb said corporation in the possession of its property, or in the use of the public streets and grounds of the city.

A decree will be entered in accordance with this opinion, granting injunction, as asked by the bill.

(Sig.) S. L. WITHEY,
District Judge, Presiding.

(Endorsed:) Filed March 27, 1879. A. Mandell, cl'k.

170 *Decree.*

At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court-room, in the city of Detroit, on Thursday, the twenty-seventh day of March, in the year one thousand eight hundred and seventy-nine.

Present, honorable Henry B. Brown, district judge.

THOMPSON DEAN, COMPLAINANT,
vs.
THE CITY OF DETROIT AND THE MUTUAL Gas Light Company of the city of Detroit, defendants. } 2241. In equity.

This cause having heretofore been brought on to be heard upon the pleadings filed and the proofs taken thereon, as to the defendant the City of Detroit, and the bill having been taken as confessed by the said defendant, the Mutual Gas Light Company of the city of Detroit, and the said pleadings and proof having been read, and Messrs. Meddaugh & Pond, of counsel for the complainant, and Messrs. Maybury and Baker, of counsel for said defendant, the City of Detroit, having been heard, and no one appearing in behalf of said defendant, the Mutual Gas Light Company of the city of Detroit, and the court having duly considered the said pleadings, proofs and arguments,

it is ordered, adjudged, and decreed that the said defendant the
171 City of Detroit, its officers, agents, attorneys, and servants be and they and each of them are hereby restrained henceforth from disturbing the said Mutual Gas Light Company in the possession of any of its property, and particularly from interfering or preventing the said company in its use of the streets, alleys, lanes, and public grounds of said city, in all respects pursuant to the terms of the grant

of power to said company contained in the ordinance of the common council of said city, passed November 28, 1871, a copy of which ordinance is attached to the bill of complaint in this cause. And it is further ordered and decreed that the said defendant the City of Detroit, pay to the complainant his costs of this suit to be taxed, &c.

(The above and foregoing decree was granted by Hon. S. L. Withey, district judge of the western district, who heard the arguments of counsel in the case in this court, and to whom the case was submitted.)

172 In the circuit court of the United States for the eastern district of Michigan. In equity.

THOMPSON DEAN, COMPL'T,
vs.
THE CITY OF DETROIT AND THE MUTUAL GAS LIGHT CO. OF DETROIT.

Bill of costs.

Attorneys fees, viz:

	$ cts.	$ cts.
On trial by court	20 00	
On depositions, etc	10 00	
Disbursements, viz.:		
Clerk's fees	17 30	
Marshal's fee, mileage, etc., on service of subpœna	5 06	
Cost of taking depositions	56 00	
Affidavit to bill of costs	25	
Taxation of costs	25	
Total		$108 86

STATE AND EASTERN DISTRICT OF MICHIGAN,
County of Wayne, ss:

F. E. Driggs, being duly sworn, says that the foregoing items of costs charged as disbursements, have actually been paid, or the liability therefor incurr*de*, and were necessary and are reasonable in amount; that the witnesses above named were, in good faith, made to attend, and were deemed material and necessary, and they respectively travelled the number of miles, and actually attended the number of days specified, and that the copies and exemplifications charged for were actually and necessarily used, or necessarily and in good faith obtained for use.

(Sig'd) F. E. DRIGGS.

Sworn to and subscribed before me this twenty-eighth day of March, A. D. 1879.

LOUIS C. STANLEY,
Notary Public, Wayne County, Mich.

173 I consent to the taxation of the within bill of costs at the sum of one hundred eight (108.86) dollars and 86 cents, on condition, however, that

Dated this 1st day of April, A. D. 1879.

F. A. BAKER,
City Counsellor.

(Indorsed:) No. 2241. The circuit court of the United States for the district of Michigan. Thompson Dean vs. City of Detroit et al. Taxed bill of costs of compl't. Clerk's office Ap'l 2, A. D. 1879. I do hereby tax the costs of the compl't at the sum of one hundred & eight dollars and eighty-six cents. A. Mandell, clerk. Precipe for fi. fa. Let a writ of fi. fa. issue in this case. To the clerk of said court.
, attorney for . Filed this second day of April, A. D. 1879. A. Mandell, clerk.

174 UNITED STATES OF AMERICA:

In the circuit court of the United States for the eastern district of Michigan. In equity.

THOMPSON DEAN, COMPLAINANT & APPELLEE,
vs.
THE CITY OF DETROIT, DEFENDANT & appellant, & the Mutual Gas Light Company, defendant & appellee.

And now comes the said defendant, the City of Detroit, and appeals to the Supreme Court of the United States from the final decree rendered in this cause at the present term of this court.

And the appellant prays that the bill and all other proceedings may be sent to said Supreme Court to the end that said cause may be heard anew, and such decree obtained therein as to the said Supreme Court shall seem just.

Detroit, May 5, 1879.

(Sig'd) W. C. MAYBURY,
Sol'r for Def't City.

(Indorsed:) Filed May 5, 1879. Jno. Graves, dep'y cl'k.

175 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court-room, in the city of Detroit, on Monday, the fifth day of May, in the year one thousand eight hundred and seventy-nine.

Present, honorable Henry B. Brown, district judge.

THOMPSON DEAN, COMPLAINANT,
vs.
THE CITY OF DETROIT AND THE MUTUAL Gas Light Company of Detroit, defendants. } 2241. In equity.

On reading and filing the *written* claim of the said City of Detroit to appeal from the decree rendered in this cause at the present term of this court, and on motion of F. A. Baker, city counsellor, it is ordered by the court now here that said appeal be, and the same is hereby, allowed, and that the penalty of the board for costs to be filed by the City of Detroit on said appeal be, and the same is hereby, fixed at the sum of five hundred dollars, with two sureties to be approved by the district judge.

176 *Copy bond on appeal.*

Know all men by these presents that we, the City of Detroit, as principal, and George C. Langdon and Henry P. Bridge, as sureties, are

held and firmly bound unto Thompson Dean and the Mutual Gas Light Company of Detroit in the full and just sum of five hundred dollars' to be paid to the said Thompson Dean, his certain attorney, executors, administrators, or assigns, and to the said Mutual Gas-Light Company of Detroit, its certain attorney, successors, or assigns, to which payment well and truly to be made we bind ourselves, our successors, and our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with the corporate seal of the city of Detroit and with the seals of said sureties on this 5th day of May, 1879.

Whereas lately at a session of the circuit court of the United States for the eastern district of Michigan, in equity, in a suit pending in said court, wherein said Thompson Dean is complainant and the said City of Detroit and the Mutual Gas Light Company of Detroit are defendants, a decree was rendered against said City of Detroit and in favor of said Thompson Dean and the Mutual Gas Light Company of Detroit; and whereas the said City of Detroit has prosecuted an appeal from said decree to the Supreme Court of the United States—

Now, therefore, the condition of the above obligation is such that if the said City of Detroit shall prosecute its said appeal to effect
177 and answer all damages and costs if it shall fail to make good its appeal, then the above obligation to be void; otherwise to remain in full force and virtue.

THE CITY OF DETROIT,
[L. S.] By GEO. C. LANGDON, *Mayor.*
(Sig'd) GEO. C. LANGDON. [SEAL.]
(Sig'd) HENRY P. BRIDGE. [SEAL.]

Attest: LOUIS DILLMAN,
City Clerk..

The above and foregoing bond and the sureties thereon are approved.

Detroit, May 5, 1879.
(Sig'd) HENRY B. BROWN,
District Judge, East. Dist. Mich.

(Endorsed:) Filed May 5, 1879. (Sig'd) Jno. Graves, dep'y cl'k.

178 EASTERN DISTRICT OF MICHIGAN, *ss:*

I, Addison Mandell, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify the above and foregoing to be a true copy of the bill, answer, pleadings, depositions, evidence, orders, proceedings, and decree, and of the original files, and of the bond on appeal, in the case of Thompson Dean, complainant, against the City of Detroit and the Mutual Gas Light Company, of Detroit, defendants; that I have compared the same with the originals of record, and on file in my office, and find the same to be true copies of said originals.

In testimony whereof I have hereunto set my hand officially and affixed the seal of said court at Detroit, this 15th day of September, A. D. 1879.

[SEAL.] ADDISON MANDELL, *Clerk.*

Clerk' fees on transcript, $55.00.

(Indorsement on cover:) No. 343. The City of Detroit, appellant, vs. Thompson Dean and the Mutual Gas Light Company. E. Michigan C. C. U. S. Filed 15th October, 1879.

16-53

Supreme Court of the United States.

THE CITY OF DETROIT,
Appellant,

vs.

THOMPSON DEAN AND THE MUTUAL GAS LIGHT COMPANY,
Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan, in Equity.

APPELLANTS' BRIEF.

HENRY M. DUFFIELD,
Solicitor for Appellants.

UNITED STATES

SUPREME COURT.

THE CITY OF DETROIT,
Appellant,

vs.

THOMPSON DEAN AND THE MUTUAL GAS LIGHT COMPANY,
Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan, in Equity.

OCTOBER TERM, 1882.

STATEMENT OF THE CASE.

The Mutual Gas Light Company of the City of Detroit is a corporation organized under an act of the Michigan Legislature, entitled "An act to authorize the formation of gas-light companies," approved February 12, 1855. (Record, p. 2, f. 5.)

Session Laws of Mich., 1855, p. 243.
1 Comp. Laws of Mich., 1871, p. 961.

The act is a general statute authorizing the incorporation of companies "for the purpose of engaging in the manufacture and supplying any town, city or village with gas for lighting the same."—*Sec.* 2.

The provisions of the act relative to the use of the public streets by these companies are as follows:

"Any corporation formed under this act shall have full power to manufacture and sell, and to furnish such quantities of gas as may be required in the city, town or village where said corporation is

located, for public or private buildings, or for other purposes; and such corporation shall have power to lay conductors for conducting gas through the streets, lands or squares of any city, town or village where said corporation is located, with the consent of the municipal authorities of said city, town or village, under such reasonable regulations as they may prescribe, and to make all ordinances and by-laws necessary and proper to carry into effect the foregoing powers." —*Sec.* 8.

The local authorities of the City of Detroit, by an ordinance approved by the Mayor, November 28, 1871, granted to the Mutual Gas Light Company authority to lay gas pipes in the streets of said city. (Record, p. 6, 7, 8.)

Section one of the ordinance regulates the manner in which the streets may be used by the company.

Section two contains the provisions involved in this case, and is as follows:

"In case the said corporation, within one year from the passage of this ordinance, shall not have built and completed gas works in this city, sufficiently extensive to enable it to manufacture gas to a reasonable amount, *or if it shall at any time enter into any combination with any gas-light company concerning rates to be charged for gas, either to the city or private consumers*, then the consent given by this ordinance shall cease, and this ordinance shall become null and void. And the said corporation is hereby *expressly forbidden to sell its property, franchises or privileges to any other gas-light company, under a penalty of a forfeiture to this city of its works, mains and other property*, and an acceptance of this ordinance shall be deemed a consent by said corporation that the title of said property shall rest in the city at once in case of such sale." (Record, p. 7.)

This ordinance constitutes its only authority to use and occupy streets of the city with its mains and pipes. See the fourth and fifth paragraphs of the bill. (Record, p. 2, fol. 6.) And the same paragraphs of the answer. (Record, p. 16, fol. 33, 34.)

By section six of the ordinance the Company was required to execute bonds to the city in the sum of $100,000, "conditioned to perform the obligations imposed upon it by section two of this ordinance, and all other conditions imposed upon it by this ordinance." (Record, p. 7, 8.) This bond was given. (Record, p. 23, 24, fol. 45, 46, 47.)

At the date of the passage of this ordinance, and the organization of the Mutual Gas Light Company thereunder, and for many years prior thereto, a company known as the Detroit Gas Light Company, organized under the same act of Legislature as the Mutual Gas Light Company, had existed and furnished illuminating gas to said city for the public use and to private individuals.

Grievous and many complaints concerning the high rates which said last named company was able to charge by reason of its monopoly in the city, had for some time prior to the passage of the above mentioned ordinance been repeatedly made by the citizens of Detroit.

The provisions of the ordinance involved in this case grew out of the desire and purpose of the municipal authorities to insure effective and lasting competition.

The gas company duly accepted the terms of the ordinance, erected works, laid mains and service-pipes in the streets, and in November, 1872, commenced to supply gas and has continued to do so up to the date of the transfer to and agreement with the Detroit Gas Light Co., hereinafter referred to.

"The Detroit Gas Light Company" was the only company supplying gas within the city at the time of the formation of the "Mutual Gas Light Company."

When the latter commenced operations a competition at once sprung up between the two companies, and continued till June, 1877. During that time gas was furnished to consumers at a price equal to twenty-five per cent. of the prices afterwards charged by the Mutual Gas Light Company and the Detroit Gas Light Company respectively after the agreement between them of which the city complained.

With a view to remedying such a state of things, the two companies in June, 1877, entered into a contract by which the territory within the city was divided, and thereafter each company was to and has occupied separate and distinct districts, the old company to supply westerly, and the new company easterly, of the center line of Woodward avenue. Each sold to the other whatever piping and property it owned lying within the other's territory. Each company immediately began and still continues the use of the pipes and mains and connections in the territories respectively purchased by them, and thus in fact obtained the selling company's franchises and privileges within the territory purchased, although the agreement between them carefully and purposely avoids mention of franchises and privileges.

It was further agreed that neither company should thereafter lay pipe or supply gas within the other's territory except as they should respectively be liable and bound to do so. Each company, however, reserved the right to perform any acts and duties in any part of the city which it should be found legally bound to do against its will, and therefore they further agreed that if either one should thereafter supply gas in the other's territory, such other should be entitled to receive the net gain thereof.

The city of Detroit claiming that said agreement was in violation of the terms of the ordinance granting permission to the said Mutual Gas Light Company of Detroit to lay gas pipes, etc., in any of the avenues, etc., throughout the said city, passed an ordinance reciting the original ordinance and the organization of the company thereunder and acceptance by them thereof, and the agreement between the Detroit Gas Light Company and the Mutual Gas Light Company, and revoking the consent granted by the original ordinance and declaring the same null and void.

Said ordinance also declared that the Mutual Gas Light Company had forfeited to the city of Detrot all its gas pipes, etc., and all its other property situated within the avenues, etc., of the city of Detroit, and also all its other property situated within the limits of said city, and declared that the title to the said described property has vested in the city of Detroit.

The ordinance further directed the City Controller to take possession of the said described property and to notify the Mutual Gas Light Company thereof.

The complainant, who was the owner of over $200,000 par value of the stock of the Mutual Gas Light Company, and more than $100,000 of the mortgage bonds of said Company, and was also one of its directors, one of the other directors being his attorney in this case, Mr. E. W. Meddaugh, and the other director the Superintendent of the Company, went through the form of declining to enter into a litigation with the city, and resolved against any such attempt on its part in the local court. (Record, p. 33.)

This action was taken on the 14th day of December, 1877, and on the 15th day of December, 1877, the bill in this cause was filed.

ERRORS ASSIGNED.

First—The Circuit Court of the United States for the Eastern District of Michigan, in Equity, erred in taking and holding jurisdiction of the cause, for the reason that it is apparent upon the record that the Mutual Gas Light Company is collusively made a defendant therein.

Second—Said Court erred in holding that the agreement between the Mutual Gas Light Company and the Detroit Gas Light Company, dividing the territory within the city, dated June 28th, 1877 (Record, pp. 25, 26 and 27), was not a combination concerning the rates to be charged for gas within the meaning of the ordinance of the City of Detroit, under which said Mutual Gas Light Company was acting.

Third—The said Court erred in holding that the agreement between the Mutual Gas Light Company and the Detroit Gas Light Company, and transferring to each company respectively the pipes, mains, etc., within such territory, was not a sale by the said Mutual Gas Light Company of its property, franchises and privileges.

Fourth—The Court erred in rendering a decree for complainant, granting a perpetual injunction against the City of Detroit from preventing or interfering with the said company in its use of the streets, etc., of said city.

BRIEF.

The statement of facts shows clearly that the action of the Board of Directors of the Mutual Gas Light Company was taken for the express purpose of enabling the complainant to file a bill in this cause against the Mutual Gas Light Company as a co-defendant with the City of Detroit, and thus confer jurisdiction upon the Federal Court, although complainant's interest is identical with that of the Gas Company. No reasonable being will, for a moment, believe that the rejection of the resolution offered by the complainant was not of his own procurement.

The whole scheme is so transparent that its real object and purpose shines through it.

Under the decision in Williams vs. Nottawa, U. S. Supreme Court, October term, 1881, it was the duty of the Circuit Court to dismiss the case on its own motion.

The real question in this case is, however, whether the agreement between the Mutual Gas Light Company and the Detroit Gas Light Company is not such a violation of the ordinance of November 28, 1871, as to terminate, or to authorize the city to terminate, the authority of the first named company to use the streets of the city.

The agreement dividing the city is a combination concerning rates to be charged for gas.

The Detroit Gas Light Company was the only gas company located in Detroit prior to 1871. The Mutual came in as a competing company, and the object of the provisions of the ordinance prohibiting combinations concerning the price of gas, and forbidding the sale of the property, franchises or privileges of the company, was to prevent a destruction by those means of the competition sought to be established.

The Court below held that the agreement dividing the city was not in terms, or in effect, a combination concerning rates. But this opinion must have been the result of a very imperfect appreciation of the change produced by this agreement in the position of these two companies, towards each other and towards the public. Before

this agreement, they occupied the streets side by side as rival enterprises, and to some extent were compelled, by force of the situation, to charge reasonable prices. After this division, each had a monopoly of the business in its half of the city. That is, the combination which they formed was such that in consequence each company was at liberty to fix its own rates. Competition between the two companies was wholly destroyed, and, as we contend, by one of the means prohibited by the ordinance, viz., a combination concerning rates.

Speaking of the contract dividing the city, Judge Withey said: "The contract is silent on the subject of rates to be charged, whether to the city or to private consumers. Both companies are left absolutely free by this contract, so far as rates are concerned. The most that can justly be claimed as to the effect of the agreement is, that as it does away with competition between the two companies, this company can raise its rates without danger of losing its customers. Suppose this company had bought out the other company's works and lines of piping. There is nothing in the consenting ordinance prohibiting such purchase; therefore, the company might have purchased and there would have been no ground of objection on the part of the municipal authorities; and yet the effect of such a purchase would have been the same, viz., it would have done away with competition throughout the entire city and leave this company at liberty to raise its rates without danger of losing its customers."

The learned Judge assumes that the ordinance must be construed, in order to sustain our position, so as to prohibit *everything* that would destroy competition, whereas in truth it only seeks to preserve competition by prohibiting sales of the corporate property, franchises or privileges, and combinations concerning the price of rates.

The question whether any particular agreement amounts to a combination cannot be affected by the fact that the company is at liberty to purchase the works and pipes of the other company. That would be one way of destroying competition, but it would not be one of the prohibited ways. In the case at bar we have to deal with an agreement dividing the city, by which the companies combined together to give each the power to charge what it pleases for gas-light, or in other words, "concerning the rates to be charged for gas."

What is a combination?

Webster defines it as an "intimate union or association of two or more persons or things, by set purpose or agreement, for effecting some object by joint operation; in a good sense when the object is

laudable, in an ill sense when it is illegal or iniquitous. When the word stands by itself it is commonly taken in a bad sense, as "combinations have been formed among the people." We say a combination of men to overthrow government, or a combination to resist oppression."

In this case the object sought was higher rates for gas, and the two companies combine by dividing the city and each agreeing not to supply the city or any person with gas in the other's territory, and if compelled to do so, the profits earned are to be paid over to the company whose territory is invaded. If this is not a combination concerning the rates to be charged for gas, then it is impossible to enter into one. It is not merely an agreement by which one company sells to the other a portion of its lines of pipe. In addition to that, they each agree to keep out of the other's half of the city, and if compelled by legal proceedings to furnish gas therein, to turn over the profits.

This makes it a mutual and continuous agreement to each pursue the same course, to accomplish the same object, viz.: an untrammeled power to fix higher rates for gas light.

By holding it not to be a combination, one would feign not to see what is, indeed, very palpable and plain.

The substance of the decision of the Court below, and of the position of the learned counsel for the gas companies, is, that a combination could not be one concerning the rates to be charged for gas, unless the companies in their agreement expressly fixed the rate both would charge; but if that had been their intention, the parties would not have used the general language they did in this part of the ordinance.

"Concerning rates" is a much broader expression than "fixing the rates," and includes combinations that relate to and affect the rates, although they are not expressly mentioned.

The true construction of this agreement is succinctly stated by the Supreme Court of the State of Michigan in

Detroit vs. Mutual Gas Light Co., 43 Mich. R., p. 594.

I can do no better than borrow the language of the Court on pp. 605, 606 and 607, as follows:

"The effect of the contract entered into with the Detroit Gas Light Company remains to be considered. Under section two of the ordinance the company was forbidden to enter into any combination with any gas light company concerning rates to be charged for gas,

and it is claimed that the agreement of June 28, dividing the city, was a violation of this provision. In my opinion this position is well taken. To my mind it seems very clear that such agreement was a carefully studied attempt to evade in spirit, but not in letter, the provision referred to. The effect of such an agreement is precisely the same as a combination concerning rates. The object sought under the ordinance was active competition, which would keep rates within reasonable limits; the result of this agreement is to remove all competition, and permit the rival companies to enjoy each its territory unmolested and freed from all danger of competition.

"The Mutual Gas Light Company could have confined itself as well to one street or one block as to one-half the city. Corporations, like individuals, should observe in good faith the letter and spirit of their agreement, and of the accepted terms and conditions imposed upon them; and they should not be permitted, while exercising the right conferred, to make careful study and effort to evade the responsibilities and restrictions imposed upon them; and if any doubt exists as to the right claimed by the corporation, that doubt should be solved in favor of the public."

With the correctness of this opinion I feel confident this Court will agree.

2. The agreement dividing the city is also a sale of the corporate franchises or privileges within the meaning of the ordinance.

The agreement expressly sells, transfers and conveys to the Detroit Gas Light Company "all the mains, service pipes, feeding meters and connections of every description thereunto belonging or pertaining," owned by the Mutual Gas Light Company, and being and lying westerly of the center of Woodward avenue.

This is coupled with an agreement not to lay gas mains or pipes across Woodward avenue, nor to supply gas to that part of the city westerly of that avenue unless legally compelled to do so against their will, and, if so compelled, to pay the profits realized to the other company.

This is not only a sale of the property consisting of the mains and pipes, but also a sale of the corporate franchises and privileges on that side of the city.

It is certainly a sale of the privileges granted by the ordinance to occupy the streets of that city and to supply the consumers therein with gaslight.

If the whole city was sold in the same way, there would be no question about it. Where, then, is the line to be drawn? If one-half of the city can be sold, why not two-thirds, or three-fourths, or all but one block? Why stop at one-half? The provision prohibiting sales of the corporate "property, franchises and privileges," was inserted for some purpose, and as the language is plain and unambiguous, there ought to be no difficulty in ascertaining its meaning. The privilege conferred by the ordinance was granted as an entirety, and for the accommodation of the whole city, and it ought to be exercised and enjoyed as an entirety or not at all.

The privilege is a unit, and is not divisible. Selling half of it is just as much a violation of the ordinance as a sale of the whole would be. Again, if a sale of the westerly half of the city is permissible, what is to prevent a sale of the easterly half? Does the power to sell either half depend upon the fact that the other half has or has not been sold? We submit that the only sensible view of the case is, that the provision in question prohibits a sale of any portion of the city to another gas company, and that the sale of all that part of the city westerly of Woodward avenue authorized the local authorities to revoke or terminate their consent.

The Court below, in disposing of this point in the case, said: "The company continues to manufacture and supply gas to about one-half of the city, more or less, and has, since the contract of June, 1877, furnished gas to both the city and to private consumers. Is selling some of its gas pipes used in supplying customers a sale of 'its property?' Such a construction would prevent the company selling a ton of coal or a load of 'its gas pipes.'"

He seems to have entirely overlooked the fact that something more than the gas pipes in the ground was sold and transferred, viz., the right to supply gas to the west half of the city, and that the distinction between a sale of this right or privilege and a sale of a ton of coal or a ton of gas pipe is clear and unmistakable. Is any body credulous enough to believe that the iron pipes buried in the streets were all that were sold, and that these companies were each willing to give up half of the city for the purpose of duplicating its piping in the half retained, or, in other words, of acquiring a quantity of superfluous and worthless property?

Again, it is not alone a sale by the Mutual Gas Light Company, or the Detroit Gas Light Company, but a purchase by them. To speak commonly, it is a "swap." A "swap," *not of the pipes, mains,*

etc., but intended to carry with it all that is necessary to give them the power, legally as well as physically, to supply the city with gas.

It is true that in the case from which the opinion of the Supreme Court of Michigan is cited above, the Court refused to decree a forfeiture as prayed in the bill of complaint of the City of Detroit.

In this respect, however, the case at bar differs materially. It may well happen that a Court of Equity will often decline to enforce a forfeiture in cases where it will not interfere in aid of a party who has justly and legally become liable to such forfeiture. In this case it seems plain that the Gas Company prepared and executed a cunningly devised plan by which they should retain all the privileges, franchises, advantages and benefits obtained by them under the ordinance of the City of Detroit, but avoid the performance of the conditions required, upon the faith of which alone such privileges, franchises, benefits and advantages were obtained.

The consent, permission and authority granted by the Common Council of the City of Detroit to the Gas Companies is expressly subject to the conditions that if the company violate the ordinance with respect to the entering into any combination with any gas-light company concerning rates to be charged for gas, then such consent shall cease and such ordinance become null and void. The condition being violated by the company, it cannot go with clean hands into a Court of Equity and ask any relief.

Whether the City of Detroit may or may not enforce at law its rescinding ordinance, is a question which cannot be raised in this case.

If it cannot, then the complainant needs no protection from a Court of Equity, for he has his remedy at law.

If it can, the company, having violated the accepted terms and conditions imposed upon it, is in no position to invoke equitable interference with the consequences of its own wrong.

HENRY M. DUFFIELD,
Solicitor for Appellants.

16-5-37

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.—No. 73.

THE CITY OF DETROIT,

Appellant,

vs.

THOMPSON DEAN AND THE MUTUAL GAS LIGHT COMPANY,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

BRIEF OF COUNSEL FOR THOMPSON DEAN.

FILED

EDWARD N. DICKERSON,

Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 73.

THE CITY OF DETROIT,
Appellant,

vs.

THOMPSON DEAN AND THE MUTUAL GAS LIGHT COMPANY.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

Brief of Counsel for Thompson Dean.

ANALYSIS OF THE PLEADINGS.

Thompson Dean, a citizen of the State of New York, filed his bill in equity in the Circuit Court for the Eastern District of Michigan, against the City of Detroit, a municipal corporation in the State of Michigan, and the Mutual Gas Light Company, a corporation organized under the laws of Michigan, having its chief office in the City of Detroit, and a citizen of the said State.

The bill was filed by the plaintiff as the holder and owner of bonds to the amount of more than $100,000, part of an issue of bonds to the amount (with accrued interest) of about $600,000, issued by the Mutual Gas Light Company, and secured by mortgages on its property, and also as holder and owner of stock of the said company to the amount of more than $200,000, par value. He averred that he had requested the president and directors of the said company to institute proceedings in the name of the company to restrain the City of Detroit from doing the various acts and things of which he complained in his bill, and which he averred the city threatened to do, and that the president and directors of the company had declined to do so.

The facts on which the plaintiff claimed relief in his bill were averred therein, as follows:

First.—The organization of the Mutual Gas Light Company, for the purpose of manufacturing and selling gas for consumption within the City of Detroit, under the laws of the State in that behalf authorizing corporations thus formed to lay pipes for conducting gas in streets, lanes and squares of the city, "under such reasonable regulations" as the city might prescribe.

Second.—The application to the City of Detroit for such "reasonable regulations," and the making of an ordinance for that purpose.

Third.—The execution by the company of the bond to the city, pursuant to the requirement of the ordinance.

Fourth.—The construction by the company of its manufactory in Hamtramck, and its commencement to distribute gas to the city and its residents about November 25, 1872.

Fifth.—That the company began at once to supply the city with gas, and subsequently made contracts with it for gas—the last one on the 14th day of August, 1877.

Sixth.—That the company, in the construction of its works, etc., had expended its capital stock, and created, in addition thereto, a mortgage debt of $650,000, and that the debt was represented by bonds of the company, which were held by different persons, complainant owning and holding over one hundred thousand dollars of them.

Seventh.—That the Common Council had passed an ordinance of repeal, and that the city threatened to take possession of the property of the company, etc.

Eighth.—That the reasons alleged for passing said ordinance of repeal were:

(*a.*) The construction of the company's works for the manufacture of gas outside the corporate limits of the city.

(*b.*) Neglect of the company to comply with the resolutions of the Common Council, passed from time to time, requiring it to lay mains in certain of the streets of the city.

(*c.*) An agreement entered into between the company and the Detroit Gas Light Company.

Ninth.—That the company had in no instance neglected or refused to lay mains or conductors of gas in any street where application had been made on the terms named in the ordinance.

Tenth.—That the ordinance did not render it obligatory on the company to locate its works for manufacturing gas within the city limits; but, if it were otherwise, that the city is estopped by its dealings with the company from now alleging that as a ground of forfeiture.

Eleventh.—That the agreement between the company and the Detroit Gas Light Company was not a breach of any of the conditions or obligations imposed upon the company by said ordinance; and that no agreement had been made by the company with any other respecting gas rates to be charged, etc.

Twelfth.—That the imposition of the several conditions, the alleged breach of which constitutes the grounds for passing the repeal ordinance, was beyond the charter powers of the city, and therefore they were not obligatory on the company.

Thirteenth.—That complainant had requested the Mutual Gas Light Company to institute suit to restrain the city of Detroit from disturbing the company in its use of the privileges granted by the Ordinance of 1871, etc., but that the company had declined so to do, and that he was holder and owner of more than two hundred thousand dollars of the capital stock of the company.

Fourteenth.—Prayer for injunction, etc.

The prayer of the bill was for an answer by the Mutual Gas Light Company and the City of Detroit, respectively, without oath, and for a writ of injunction, restraining the city, its officers, &c., from disturbing the company in the possession of any of its property, and particularly from interfering with its use of the streets, &c., in all respects pursuant to the terms of the grant of power to use them contained in the ordinance of November 28, 1871, and for further relief in the premises.

The Mutual Gas Light Company did not answer the bill, and against it the bill was taken *pro confesso.*

The City of Detroit filed a plea to the jurisdiction of the court, and an answer. To so much of the bill as contained averments of the jurisdictional facts, the plea avered :

1st. That the Mutual Gas Light Company had not refused to bring suit, except collusively, and for the purpose of enabling the complainant to make the jurisdictional averments in his bill and to give jurisdiction to the Circuit Court.

2d. That the complainant was not a mortgagee of the property of the company, but a holder of bonds merely, which were secured by a mortgage of the property of the

company to trustees, and that the complainant had not requested the mortgage trustees to bring suit, and they had not refused to do so.

Wherefore, the plea denied the right of the complainant to bring this suit either as stockholder or as bondholder.

As to the remainder of the bill, the City of Detroit answered as follows:

It admitted the following averments of the bill:

1st. As to the organization of the Mutual Gas Light Company.

2d. As to the provisions of the act authorizing such organization, respecting the use of streets, etc., of cities.

3d. As to the purpose for which the company was organized, and the application to the Common Council for use of the streets, etc.

4th. As to the passage of the ordinance authorizing said company to use the streets, etc.

5th. As to the execution by the company of a bond, and its delivery to the city, pursuant to the requirement of the ordinance.

6th. As to the company's construction of its manufacturing works, the date when completed, and that the city was informed of the fact on the 10th of December, 1872.

7th. As to the company's beginning to manufacture gas and to supply the city and its residents with gas November 25, 1872, and that it has ever since continued to supply them—the city itself, under various contracts, the latest of which was made August 14, 1877, for one year—but denies that it was then known that the company had entered into the agreement with the Detroit Gas Light Company.

8th. As to the passage by the Common Council of the ordinance of repeal, and the reasons alleged in justification thereof.

All other averments of the bill are denied, and it is particularly insisted that the company has violated the ordinance of consent in the three following respects:

1st. In the construction of its manufactory in Hamtramck, instead of the City of Detroit.

2d. In not complying with the directions of the Common Council, given from time to time, to lay mains for conducting gas in certain streets within the terms and conditions in that behalf of the consenting ordinance.

3d. In that the company had made an agreement or combination with the Detroit Gas Light Company concerning rates to be charged for gas; and had, further, sold its property, franchises and privileges to the Detroit Gas Light Company; in short, had made the written agreement set forth in the bill of complaint.

At the final hearing, the plea to the jurisdiction and the answer were considered together.

The Circuit Court held that the facts in evidence gave the complainant a right to sue, and that they satisfied the conditions necessary to give the court jurisdiction. On the merits of the issues made by the answer, the court decided in favor of the complainant. A final decree was made on the 27th of March, 1879, granting the prayer of the bill, and perpetually enjoining the city according to the prayer, and awarding the complainant his costs. From this decree the present appeal is taken.

Concerning the Plea to the Jurisdiction.

If this plea is open on this appeal, the following are the facts as they appear on the evidence by which the plea must be adjudged:

Mr. Fitch, the President of the Mutual Gas Light Company, and one of its directors, testified:

That before the bill in this cause was filed, complainant

made application to the Board of Directors of the company to institute suit, and that the board refused.

A copy of the record of the Board's action showing such refusal was put in evidence (Record, p. 33).

The testimony of the witness on cross-examination, on this point, appears from page 55 to page 66 of the Record. Its substance and effect are: That the complainant Dean, and himself, and Meddaugh, composed the Board of Directors; that he and Dean together owned a majority of the stock of the company, and that complainant was its principal stockholder; that he and complainant were friends of many years' standing, and had long held intimate business relations with each other; that the directors' meeting was held at complainant's suggestion, with whom the witness had talked about a suit by the company against the city, expressing his own opinion against it, on the ground that the local State Courts were prejudiced; that he had the impression that complainant preferred the Federal Court; that he would not have voted for a suit in the State Court had he supposed complainant to prefer it; that he knew the result of the action of the board would be to permit complainant to bring this suit, and personally he was glad of it; that Meddaugh & Driggs, who are complainant's solicitors in this cause, had been attorneys for the company; and on page 62 of the Record, in answer to the question, "Was there not an understanding, tacit or expressed, between the members of the Board of Directors, that the board, as such, should refuse Mr. Dean's request to bring suit?" he says, "I don't know as there was any understanding of that kind, tacit or expressed; my impression was that the board would; that I said before; I don't know what the other members of the board thought about it; I am pretty well satisfied, so far as my impression is concerned, that Mr. Dean expected they would refuse it, because he knew that I had talked with Meddaugh." And again, on the same page, in further explanation, he says: "I knew that Mr. Meddaugh was opposed to bringing any suit in the local courts, etc., etc., and Mr. Meddaugh and I being a majority of the board, I had a pretty good idea of what a majority of the board would do."

In reference to having a meeting of the board and getting its action on the subject of bringing suit, the witness said that he did not think a board meeting necessary, having had some experience in these matters before ; that his idea was that his refusal, as president of the company, to bring suit was sufficient ; but that complainant wanted the action of the Board so that the refusal might appear of record (Record, p. 64).

I submit that in the most favorable aspect for the defendant of the testimony on this point, it establishes this state of facts : That complainant wanted suit brought to restrain the city's threatened action against the company ; that he consulted the president of the company about it, who expressed his opposition to it on the ground that the local State Courts, in which the company alone could sue, were so biased against it that justice would not be had ; that for this reason, and the additional one that the president preferred the remedy by force, he declined ; that he had conversed with the other director on the subject, and knew he concurred in this view, which fact he communicated to complainant ; that complainant desired the refusal to be made matter of record, and so the meeting of the board was called—all parties well knowing in advance what the result of the meeting would be—but without previous *agreement* as to what the board would do.

This was such a refusal by the company to act as gave the complainant, or any other stockholder, the right to file a bill.

Pond vs. *The Vermont Valley Railway Co.*, 12 Blatchf., C. C. R. 281. In this case a bill was filed by stockholders of the defendant company to restrain the execution of a lease of the railroad to the Rutland Railroad Company. There were nominally two Boards of Directors in existence, the old and new board, as they are respectively termed in the case. The old board, it seemed, threatened to execute the lease. The bill averred the new board to be the only lawfully constituted body, and that it had been requested to bring suit to restrain the old board from executing the lease, which it declined to do. The board itself could not have sued in the United States Court.

Woodruff, *J.* (p. 293), speaking on the subject of the

court's jurisdiction, says : " It cannot prevent or defeat the right of complainants to sue, if it be true that such directors refused to bring suit in order to drive the complainants to bring suit themselves for their own protection, etc.

" If the grounds of jurisdiction exist, the *motives which led thereto are not material.*"

See also Dodge *vs.* Woolsey, 18 How., pp. 334-5-6.

Perdicaris vs. *The Charleston Gas Light Co.* (10 Int. Rev. Rec., p. 110) holds, that it is sufficient to authorize a bill by a stockholder, that the corporation has neglected to sue.

See also Memphis *vs.* Dean, 8 Wall, 64.
Newby *vs.* Oregon Central R. R. Co., 1 Sawyer, 63.
Hotel Co. *vs.* Wade, 95 U. S., 13.
Barney *vs.* Baltimore City, 6 Wall., 280.
McDonald *vs.* Smalley, 1 Peters, 620.

In regard to the right of the complainant to sue as a bondholder, it was not the duty of the mortgage trustees to protect him or the other bondholders against acts of the city injurious to the value of the bonds. The terms of the mortgage by which the bonds were secured are not in evidence. All that appears is that they were secured by a mortgage to trustees on the property of the company; and the court will not presume that the trustees had any other than the ordinary duties, namely, to foreclose when the conditions of the mortgage required it. No application, therefore, to the trustees to sue was necessary. The only party having a cause of action against the city, primary to the right of action by the bondholders or the stockholders, was the Mutual Gas Light Company, as the representative of its stockholders and its bondholders. As to any cause of action against the city, the trustees of the mortgage did not represent the bondholders.

ON THE MERITS OF THE ISSUES MADE BY THE ANSWER OF THE CITY OF DETROIT.

I.

The Act of the Legislature of ~~Illinois,~~ Michigan passed February 12, 1855, by its 8th section, conferred on gas companies that might be organized under it two franchises or powers.

1st. A power to manufacture, sell and furnish gas in the city, town or village where the corporation might be located, for public or private buildings, or for other purposes.

2d. A power to lay conductors for conducting gas through the streets, lanes or squares of the city, town or village, subject to the consent of the municipal authorities, under such reasonable regulations as they should prescribe.

The second of these powers is the only one in the exercise of which the company is subjected to the *legislative* power of the municipal authorities. The "reasonable regulations" which the municipal authorities are authorized to make are such only as relate to the use of the streets, lanes or squares which are under their legislative authority and government.

It follows, therefore, as is claimed in the plaintiff's bill, that all the provisions of the city ordinance of November 28, 1871, which do not relate to the manner of using the streets, &c., in the laying of conductors of gas, so far as they have any force, are nugatory and void as municipal regulations, and must be treated only as matters of contract between the company and the city, so far as they were assented to by the company.

The 1st, 2d and 3d subdivisions of the city ordinance of November 28, 1871, exhaust the power of municipal *regulation* or *legislation*. They relate to the use of the streets, &c.

Sections 2, 3, 4, 5 and 6 of the ordinance relate to matters outside of the municipal authority of "regulation,"

and could only be imposed upon the company as matters of agreement and contract,

See the Ordinance, Record, p. 21.

[It will be noticed that at the end of the 8th section of the act (Record, p. 15) there is a clause which empowers *somebody* to make "all ordinances and by-laws necessary and proper to carry into effect the *foregoing powers*." From the context it does not appear who or what is the antecedent; whether it is the municipal authorities or the company that is to make ordinances and by-laws, &c. But if it is assumed to be the former, the power must still be confined to ordinances and by-laws regulating the use of the streets, &c.]

II.

The conditions exacted by the ordinance of November, 28, 1871, were the following:

1st. That the company shall have built and completed within one year from the date of the ordinance, "Gas Works in this City," sufficiently extensive to enable it to manufacture gas to a reasonable amount.

2d. That at no time shall the company enter into combination with any (other) gas light company concerning rates to be charged for gas, either to the city or private consumers.

Failure to comply with the first of the conditions, or a breach of the second, was to operate as a withdrawal of the consent given by the ordinance.

3d. That the company shall not sell its property, franchises or privileges to any other gas light company, under a penalty of *forfeiture* to the city of its "works, mains and

other property;" and its acceptance of the ordinance was to be deemed a consent by the company that the *title* of said property shall vest in the city at once in case of such sale.

4th. That so long as there should be competition in the supply and sale of gas light in the City of Detroit, this company should have the privilege of supplying it at such rates *less* than those charged by the Detroit Gas Light Company as might be agreed upon between it and the consumers, public and private; and that in no instance should this company charge either public or private consumers higher than an average of the rates charged to public and private consumers in the cities of Buffalo, Chicago, Cleveland, Toledo and Sandusky.

5th. In the streets where this company had not within two years from the date of the ordinance laid mains or conductors, it should, upon petition of at least two applicants or occupants of buildings on such streets, for a supply of gas, averaging two buildings in every 200 feet of main pipe required to supply the same, lay mains in such streets, when directed by the Common Council, the Common Council ordering therein the usual proportion of lamp-post service. In case of breach of this condition, after direction by the Common Council, the company was to be subject to the forfeiture declared in section 2 of the ordinance, that is, a forfeiture of its whole property.

6th. That the company should supply gaslight under uniform and sufficient pressure between sun-set and sun-rise, and of a certain average quality of light.

7th. That within sixty days after the passage of the ordinance, the company should have $500,000 of subscribed capital, and have filed their articles of association according to law; and that the corporation so organized should execute bonds in the sum of $100,000, conditioned to perform the obligations imposed upon it by the second section of the ordinance, and all the other conditions.

These conditions and requirements being outside of the *Legislative* power of the municipal authorities, and therefore, so far as they were accepted and acted upon by the company, being mere matters of contract, are to be construed strictly against the party imposing them, especially when they undertake to work a forfeiture of all the property of the company as a penalty for a breach of any of them. Excepting as grantees of permission to lay gas mains in the streets, &c., under such reasonable regulations as might be prescribed, the company was in no way under the legislative authority of the city. In all other respects the parties were contractors with each other; and the city having imposed conditions which the law did not authorize it to impose, and having bargained for a forfeiture in case of a breach of the conditions, must have the question of such breaches determined by a strict construction of its rights, just as if it were a private party.

On the other hand the company, having accepted the ordinance and entered upon the performance of the contract, given the required bond, &c., is to be deemed to have agreed to the imposed conditions—not as conditions of the grant of permission to lay its mains in the streets, &c., but as matters of contract between itself and the city arising after that permission had been given, and agreeing to a forfeiture of its property as a penalty for breach of its contract, which forfeiture and penalty are to be construed strictly against the party imposing such extra legal conditions.

III.

The ordinance passed by the Common Council December 14, 1877, purporting to revoke and repeal the Ordinance of November 28, 1871, and to declare a forfeiture of all the property of this company, is not to be deemed a legislative

act passed by any legislative authority conferred upon the City of Detroit by the Legislature of the State.

The Act of February 12, 1855, § 8, did not confer on the city any legislative power to withdraw its consent to the laying of mains in the streets of the city, after such consent had been given, by resorting to the effect of conditions imposed without any authority of law and made mere matters of contract between the city and the company.

The grant or consent to lay the mains, &c., in the city streets was an executed consent, subject only to proper regulations, such as are contained in the first section of the Ordinance of 1871. It constituted a valuable and vested franchise of the company, of which it could not be deprived by any legislative authority vested in the City Council; and it was only by requiring the company to enter into a *contract* by which it agreed to forfeit this franchise in case it neglected to lay mains when directed by the Common Council, that the city could obtain any ground or pretext for withdrawing its consent. Moreover, the forfeiture to which the company was subjected by the 4th section of the Ordinance of 1871, was a forfeiture of all its property, as well as of the franchise vested in it by the consent given in that ordinance.

In no way could effect be given to any of these forfeitures without a judicial proceeding to declare and enforce them. The City of Detroit stood in the position of a party holding a contract, whereby the other party had agreed that on the breach by it of certain conditions of the contract, it would submit to a forfeiture of all its franchises and all its property. The idea that the party having the right to claim these forfeitures could, by its own act, declare and enforce them, making itself both judge and jury, and resorting to no judicial tribunal, is simply preposterous. The provision of the ordinance, that on a breach of one of the conditions, that directed against a sale of the property to another company, the title of the property shall at once vest in the city, conferred no judicial authority on the City Council to declare and enforce such forfeiture. The utmost that it did was to give the city a right to institute some judicial proceeding whereby the

title might be declared to be vested in the city and steps be taken to put the city in possession. It would be a novel doctrine that a party who has obtained by contract a right to forfeit the property of the other party to his own use, can himself declare the forfeiture, find the breach of the condition, and proceed to take possession.

The so-called revoking and repealing ordinance (Exhibit A, Record, p. 20) made the following *recitals:*

1st. That the company did not, within one year from the passage of the Ordinance of 1871, or at any other time, build and complete gas works *within said city* sufficiently extensive to enable it to manufacture gas to a reasonable amount, but did, in *violation of said ordinance*, build its gas works without the limits of said city, to wit, in *the town of Hamtramck.*

2d. That the company, for the purpose of destroying competition between itself and the Detroit Gas Light Company, on the 28th of June, 1877, contrary to the provisions of the ordinance, entered into a combination with the said Detroit Gas Light Company, concerning rates to be charged for gas to the City of Detroit and to private consumers.

3d. That the company, in violation of the ordinance of 1871, on the 28th of June, 1877, entered into a contract and agreement with the Detroit Gas Light Company, whereby (as the Common Council construed the agreement) the for mer sold and conveyed its gas works and property to the latter company.

4th. That the company has at all times from the acceptance by it of the Ordinance of 1871, utterly and wholly neglected and refused to comply with the provisions of section 4 of said ordinance [being the section which related to the laying of mains, &c., in all streets where they had not been laid within two years from the time of the passage of that ordinance.]

Having made these judicial or *quasi* judicial findings of

certain facts, the Common Council, in its ordinance of revocation and repeal, proceeded in like manner to make a judicial or *quasi* judicial declaration of forfeiture, as well as a revocation of its consent given in the Ordinance of 1871, in the following manner:

1st. That the consent, permission and authority given by the Ordinance of 1871, to lay gas pipes, mains, conductors and service pipes in any of the streets, &c., of the City of Detroit, be and the same hereby is revoked, and declared null and void.

2d. That the company is *hereby declared* to have forfeited all its property situated within the City of Detroit, and the *title* to all such property is *hereby declared* to have vested in the City of Detroit.

3d. The City Comptroller was authorized and directed to assume possession and control of all the property mentioned and described, to notify the company, and to serve on it a certified copy of the ordinance.

Hence, then, there was not only a finding of a forfeiture in the nature of a judicial decree, but something in the nature of an execution, issuing from the Common Council of a municipal corporation! The judicial, or *quasi* judicial powers thus assumed rested upon the assumption that in agreeing to a forfeiture of its property, in case of a breach of contract, the company had waived the benefit of the constitutional axiom that no person shall be deprived of his property without due process of law, and had submitted the whole determination of the facts and the law to the other party to the contract.

Of course, the so-called revoking and repealing ordinance can be looked upon only in the nature of an instruction to the proper law officer, or legal agent of the city, to enforce its supposed rights by application to some judicial tribunal. As a finding of facts, or a declaration of the legal consequences of any facts, it amounts to nothing. If the Comptroller had attempted to take possession of the property by

force, under this ordinance, it would have been perfectly lawful for the company to repel that force by other force, and it is not difficult to see which party would have been responsible for a breach of the peace.

This result was prevented by an injunction issued by the court below in this suit. This injunction, operating *pendente lite* and until the further of the court, in no way interfered with the right of the city to procure a judicial declaration of any forfeiture which it might be entitled to enforce, but simply restrained the city from disturbing the company in the possession of its property, and from interfering or preventing it from using the streets, &c., in all respects pursuant to the terms of the grant of power contained in the Ordinance of November 28, 1871. (See the temporary injunction order of January 14, 1878, Record, p. 11.)

At the final hearing in the court below it does not appear that any but the 2d and 3d of these supposed causes of forfeiture were insisted on by the respondent, the City of Detroit. These, at all, events were the only grounds of forfeiture specifically passed upon by the court below; and it is not supposed that this court will regard any of the others as covered by this appeal. (See the opinion of the court below, Record pp. 92-95.) But if any of the others are open here, it is to be noted that the court below found in its opinion "that no provision of the consenting ordinance has been violated by the Mutual Gas Light Company."

With regard to the supposed cause of forfeiture on account of the fact that the gas *works*, the place of manufacture of the gas, was located in the town of Hamtramck, it is only necessary to say that the undisputed evidence was that the location was about 800 or 900 feet outside of the city boundary, and that to construe the Act of the Legislature, as requiring the gas to be manufactured within the city limits, when convenience, the public health, or any other cause might make a point just outside of the city limits necessary or desirable, would be to resort to a trivial technicality in order to work a forfeiture on account of a fact of which the city never complained until it adopted the revoking or repealing ordinance. If such a cause of forfeiture ever existed, it had been long waived;

and under that waiver very important rights had accrued to the company. Moreover, the Act of the Legislature will not bear such a construction. The corporations which it authorizes, are to manufacture, sell and furnish gas in the city, town or village where *they* are located. If the gas is made out of the city limits, but is sold and furnished within those limits, no one is injured. Again; it is equally a compliance with the terms of the ordinance, which required the company within one year to build and complete "gas works in this city," if the manufacturing works are situated near enough to the city to enable the company to sell and supply gas within the city. There is no evidence in the record that this was not so; and the long course of years, during which the city itself was a customer of this company, show that there never was any complaint or cause for complaint on account of the location of the works, until this trivial objection was set up in the repealing and revoking ordinance; and even now it is not suggested that any inconvenience or injury has resulted from that location.

With regard to the 4th of the alleged causes of forfeiture, if it is open on this appeal, it is to be observed that it relates to the requirements of section 4 of the consenting ordinance, namely, the laying of mains in the streets where they had not been laid within two years from the time of the passage of that ordinance. The requirements were, that when there was a petition for a supply of gas by at least two applicants or occupants of buildings on a street where there was an average of two buildings in every two hundred feet of pipe required, the company should, when directed by the Common Council, lay mains in such street; and it was in effect made a further *proviso* that the Common Council should order in such street the usual proportion of lamp-post service. It is apparent, therefore, that the company could not be in default, unless three things concurred:

1st. The petition for gas by the requisite number of petitioners representing a certain number of buildings. 2d. An order of the Com

mon Council thereon to the company to lay the mains. 3d. An offer, order or undertaking of the Common Council to set up lamp-posts according to the usual proportions of such service. The evidence entirely fails to show that any such case ever occurred in the whole history of this company. Mr. W. H. Fitch, Jr., the president and acting manager of the company from the time of its organization, was examined as a witness and was cross-examined at great length by the counsel for the city. He testified that he had always laid pipe when the request was accompanied by the conditions required by the ordinance, and had never refused or neglected to do it except when it was not so accompanied. (Record, p. 43 *et seq.*) Although many minute details were gone into in the cross-examination, not one instance was shown in which the company had refused or neglected to comply with an order based on the three concurring conditions. The respondent introduced no evidence to control this testimony of Mr, Fitch.

IV.

We come, therefore, to the second and third of the alleged causes of forfeiture, which were specifically covered by the opinion of the court below.

The second is, that this company, for the purpose of destroying competition between itself and the Detroit Gas Light Company, on the 28th of June, 1877, contrary to the provisions of the consenting ordinance, entered into a combination with the Detroit Gas Light Company concerning rates to be charged for gas to the City of Detroit, and to private consumers.

The evidence to support such alleged combination is confined to the terms of a written agreement between the two companies, executed June 28, 1877 (Record, p. 25, 27). This agreement shows that the two companies divided the city territory by a line running through the

centre of "Woodward avenue." The Detroit Gas Light Company sold and conveyed to the Mutual Gas Light Company all its mains and service pipes, feeding-meters and connections on the east side of that line, including its *gas-holder* on the easterly side of "Chene street." The Mutual Gas Light Company sold and conveyed to the Detroit Gas Light Company all its mains, service-pipes, feeding-meters and connections on the westerly side of the line. The valuation of these respective properties left a balance of $140,000 in favor of the Detroit Gas Light Company, which was agreed to be paid by the Mutual Company in a certain manner. The two companies then agreed that after the delivery and receipt of the respective properties so sold, neither of them would lay gas mains or pipes across Woodward avenue, and that neither company would supply gas in the territory of the other, unless legally compelled to do so against its own will; and in case of such legal compulsion, that they would account to each other in a certain manner. Each company expressly reserved to itself, in case of such legal compulsion, the right to perform in any part of the city any acts or duties which it might be found, against its own will, legally bound and liable to perform. When such a case of legal compulsion to supply gas, contrary to the mutual agreement, should have arisen, the two companies agreed to account with each other, and to make monthly settlements, upon a certain rule, namely, such rate for each 1,000 cubic feet of gas so supplied, as the other company should show to be its net gain per 1,000 feet on its aggregate supply of gas to private consumers during and for the time such supply was being made, or at the rate of profit per thousand cubic feet made by the company supplying the gas on its aggregate consumption by private consumers during such time as the company in whose agreed territory such supply was legally compelled, might elect.

It is quite apparent that this agreement evinces no intent to destroy competition, and that it had no such effect or tendency. It left the question whether the city could compel the Mutual Company to continue to supply gas directly

through all the territory of the city, an open question, to be tested whenever the city should choose to submit it to any competent judicial tribunal. In the event of its being legally compelled to furnish gas by its own mains, &c., in the territory where it agreed with the District Company not to furnish it unless so compelled, the Detroit Company would be bound to account to the Mutual Company according to the agreed rule, and so there would be practically the competition that would have existed between the two companies if the agreement had not been made. The same thing would be true of the Detroit Company, if it should be legally compelled to do any acts or perform any duties in the territory of the Mutual Company. . The agreement did not destroy competition, or diminish the area of competition. The agreement might remain, and each company would be practically a check on the other in respect of rates charged to consumers; The Mutual Company could put its rates as low as it might see fit, and the Detroit Company, if it charged a greater rate in its own agreed territory, could not retain to itself the difference, but would have to settle with the Mutual Company according to the agreed rule. What rates either company should charge was a matter not touched by the agreement. The Mutual Company could not raise its rates without danger of losing its consumers, if the city should cause it to be judicially decided that it was bound to furnish gas throughout the whole of the city territory. That it had a right to withdraw its direct service from a part of the city territory, and leave it for judicial decision to determine, at the instance of the city, whether the consenting ordinance bound it to maintain competition by such direct service everywhere, is perfectly plain.

Section 3 of the consenting ordinance shows that it was contemplated that there might come a time when all competition in the sale of gas in the City of Detroit might cease (Record, p. 22). So long as such competition should continue to exist the Mutual Company was to have the privilege of charging such rates, less than those charged by the Detroit Company, as its customers might agree to pay; but in no event was it to be at liberty to charge either pub-

ic or private consumers higher than the average of rates charged to public and private consumers in certain other cities. This provision of the consenting ordinance remained unaffected by the agreement between the two companies.

The court below held that this agreement was not a combination concerning rates; and we submit that the ruling was correct.

The third of the alleged causes of forfeiture covered and negatived by the opinion of the court below is, that by the sale to the Detroit Company of its mains, &c., lying west of Woodward avenue, including also one of its *gas-holders* on that side of the line, the Mutual Company violated the prohibition of the consenting ordinance against a sale of "its property, franchises or privileges," and so forfeited all its property of every description wherever situated in the City of Detroit. To which we answer as follows:

1. As to its franchises, this company has never made any sale.

2. It never agreed to withdraw into the territory west of Woodward avenue excepting provisionally, namely, that so long as it should not be legally compelled to furnish and sell gas on both sides of the city, it would furnish and sell only in the territory on the west side of Woodward avenue.

3. All the property that was sold was that part of the company's property lying east of the avenue. The *gas-works* proper, and all its mains, &c., lying west of the avenue were retained, and the company continued to be in a situation in which it could furnish and sell gas throughout the city if legally compelled to do so; and, in point of fact, continued to manufacture and sell gas to about one-half of the city, and has, since the agreement between the two companies, actually sold it both to the city and to private consumers on the west side of the avenue.

The court below held that this was not such a sale as was prohibited by the consenting ordinance, or such a sale as the company agreed not to make; that the sale which it

agreed not to make was a sale to any other gas company of so much of its property as would prevent it from supplying gas to the city and to private consumers. We submit that this ruling was entirely right.

V.

We have considered this case thus far as if there was a valid contract between the city and the Mutual Gas Light Company, whereby, on the breach of certain conditions of the contract by the company, all its property and franchises could be forfeited to the city. But there is a fundamental question remaining to be considered, viz.:

Whether the supposed contract, even if it entered into between the city and this company, is valid and can be enforced?

If it is valid, it is equally binding upon both parties. If it is invalid, neither party is bound by it.

1. Municipal corporations have not the same power to make contracts as private parties have. They can enter into such contracts only as are directly authorized by their granted powers, or such as are necessarily implied as incidents to the exercise of those powers.

1 Dillon on Municipal Corporations, p. 55, 371.
Hodges *v.* The City of Buffalo, 2 Denio, 110.
Halstead *v.* The Mayor, &c., of New York, 3 Comstock, 430.
The State *v.* The Cincinnati Gas Light Company, 18 Ohio St., 295.

2. The charter of the City of Detroit conferred on the city no power to make a contract with a private corporation or individual whereby a forfeiture of any property other than money would accrue to the city as a penalty.

Charter of Detroit, p. 72.

3. The Act of the Legislature authorizing the formation of gas companies in any city, town or village of the State, conferred on such city, &c., no authority to enter into a contract with such gas company whereby a forfeiture of its property would accrue to the city as a penalty for breach of such contract. The right to be a corporation and to manufacture and sell gas, constituted franchises derived directly to such companies from the act itself. The power to lay mains, &c., in the streets, &c., was also granted by the act, subject only to the consent of the city, &c., upon reasonable regulations, to be prescribed by the municipal authorities in respect to the use of the streets, &c. The clause of the act (sec. 8) which empowered somebody "to make all ordinances and by-laws necessary and proper to carry into effect the foregoing powers," if construed as a power conferred on the city, &c,, cannot be held as conferring a power to make a contract whereby the city would become the owner of the property of the gas company in a certain event; for no such contract, whether effected in the form of an ordinance or a by-law, would be necessary or appropriate to the carrying into effect the powers granted by the act; and the authority to make ordinances or by-laws, as matters of municipal regulation, could only relate to regnlations concerning the use of the streets and public grounds of the city.

See the Act, sec. 8; Record, p. 15.

4. All that part of the consenting ordinance which provides for forfeitures of property to the city would, if effect were given to such forfeitures, make the city the owner of gas-works for the manufacture of gas, and of conductors, &c., for supplying it, &c. The city must either run the gas-works and supply and sell the gas, or it must sell the property and put the proceeds in its treasury. Neither the City Charter nor the Act of the Legislature empowers the city to become a manufacturer or vendor of gas, or to make money by becoming the purchaser and vendor of such property. The act of the Legislature clearly implies that the manufacture and sale of gas is to be in the hands of private incorporated companies, and not in the hands of the

municipal corporations, which, unless specially thereto authorized by the Legislature, can have no machinery for carrying on such a business.

5. The provisions of the consenting ordinance which imposed forfeitures of the property and franchises of this company being in excess of the powers conferred on the city, are void.

Grand Rapids *v.* Hughes, 15 Mich., 54.
Phillips *v.* Allen, 41 Penna. St., 481.
White *v.* Talman, 2 Dutch, 67.

6. Under the Constitution of the State, the Legislature, even if it had undertaken to do so, could not have conferred on the city power to make a contract with a gas company whereby its property would become forfeited to the city as a penalty for breach of the contract. Only powers of a local, legislative and administrative character can be conferred on cities. Although the power in question is local, it is neither legislative nor administrative; for it is nothing but a power to make a bargain for becoming the owner of certain property in a certain event, and such a power is not comprehended in the legislative or administrative powers of municipal corporations. To become a trader in gas, or any other commodity, is not a legislative power or one the administration of which concerns the government of the municipality. Nor would it be within the constitutional competency of the Legislature to confer on a municipalty power to regulate the price of gas, or of any other commodity.

See the Constitution of Michigan, art. IV., sec. 88.

VI.

If there was a valid contract, the City Council had no power to repeal the ordinance of consent until after a judicial determination of the question of the company's breach

of its conditions; and in the event of such a judicial determination in favor of the city, it would have been for the court having jurisdiction of the proceeding to direct what relief the city was entitled to, and to have settled the limits of that relief.

In the case of the *Flint & Fentonville Plank Road Company* v. *Woodford*, 25 Mich., 99, the Supreme Court of this State expressly so held respecting the power of the Legislature to repeal the charter of the company.

The reasoning of the court in that case is equally applicable to the facts of this, and would seem to be conclusive. The gist of it is that the repeal involves a judicial act, to wit, that of determining the question of violation of the contract by the other party, and the power of determining such question does not belong to the legislative department.

The case of *The Brooklyn Central R. R. Co.* v. *Brooklyn City R. R. Co.*, 32 Barb. R., 369, fully sustains this position. See particularly pages 365–6 and 7.

The case of the *Pacific Railroad Co.* v. *Leavenworth* (1 Dillon, C. C. R., 393), will, no doubt, be cited by opposing counsel to sustain the action of the city in passing this repealing ordinance. It will be observed that the question of the power of the City Council to do this before a judicial ascertainment of the forfeiture was not raised.

As this case may also be used as authority for the city's claim of the right to require or agree for the conditions and stipulations of the ordinance respecting the price to be charged for gas, I desire to call attention to its facts, and to give just what is determined by it.

The case arose on a bill filed by the company to restrain the City of Leavenworth from taking up the track of the complainant, which had been laid in the streets of the city, under authority of an ordinance of the city passed for that purpose.

The assent of the corporate authority of a city is by the statute of Kansas made necessary before a railway company should lay its track in the streets. The assent in this case was given by the city in the form of an ordinance which prescribed the *manner in which the company should keep*

and maintain the street, or some part of it, and also that the company should construct and maintain between certain streets named, and within a time limited, "all of the freight and passenger depots used and required for the transaction of the business of said company in said city." The ordinance further provided that if the company failed to fulfill any of the obligations imposed by the ordinance the city might enter upon and "resume possession of all the public grounds of the city on which said company shall have constructed its road by virtue of this grant."

The railroad company laid its track in the streets of the city, but failed to comply with the conditions.

The city repealed the ordinance and instructed the City Marshal to take possession of the public grounds of the city on which the track of the company had been laid.

The railroad company brought this bill for an injunction.

It was argued by counsel for the motion that the conditions imposed by the city were in excess of its power.

On page 305 the judge says:

"In the case before me the work which the company agreed to do in consideration of the right of way granted, seems to be upon or connected with the streets occupied, and there is nothing in the record to show more was required of the company than was reasonable under the circumstances," etc.

The conditions of the grant here had relation to the streets occupied. In our case the conditions are entirely foreign to the privileges asked and authorized by the statute to be granted.

The two cases would have been parallel had the City of Leavenworth made the grant on condition that the railroad company should forever thereafter transport its citizens and carry freight for them at a fixed named rate.

And so as to the case of *The Northern Central R. R. Co.* v. *The Mayor, etc., of Baltimore*, 21 Maryland R., 93, which was a bill in chancery by the City of Baltimore to restrain the railway company from constructing or laying a railroad in the streets of the city. By special act the Legislature of

Maryland authorized the company to build a branch road, but before such road should be constructed in the city limits the required consent of the Mayor, etc. An ordinance was framed giving consent, but on conditions respecting the grading, etc., of the streets, the rate of speed of the cars in the city, and other like conditions.

The company, disregarding the conditions as to grade of streets, proceeded to construct its road; hence a bill for injunction.

The injunction was granted and the Supreme Court sustained it.

We have no quarrel with the decision, or the reasoning on which it goes. Both seem to us entirely sound. There is nothing in either to sustain the position of Detroit in our case.

All of the conditions here imposed are pertinent to the grant.

VII.

If it be contended, and the court shall hold, that the powers of the Common Council in respect to this class of matters are akin to, and carry all the rights and incidents of, like powers of individuals, then I insist that there has been a complete waiver by the city of all objections of the character set up in the answer.

The city must submit to occupy one of two positions in this relation—either the governmental or the proprietary; if the latter, then it is liable to all the consequences of a natural person under like circumstances.

There can be no doubt that a natural person standing in such a contract relation to this company, who should continue to treat the contract as subsisting by accepting the benefit of acts in its performance, subsequent to the violations complained of, would be held to have waived the objection—condoned the fault.

The agreement between the two gas companies was exe-

cuted June 28th, 1877. The record shows that the three daily papers of the city repeatedly published the fact before the following August. On the 14th day of August the city entered into a contract, in writing, with the gas company for supplying its lamp posts easterly of Woodward avenue, and the Central Market, with gas for the period of one year.

It cannot be successfully contended that the city, when making this contract, did not know of the violations of the ordinance now complained of, with three newspapers, all having a general circulation in the city, announcing the fact several times. This knowledge, in the absence of all evipence to the contrary, will be presumed.

On the point of waiver, see the reasoning in the *Brooklyn R. R. Co.*, 32 Barb., above cited.

VIII.

Since the decree of the Circuit Court in this cause was made, the mortgage foreclosure proceedings mentioned in the bill of complaint, have been prosecuted to completion, and all the property, franchises and privileges of the Mutual Gas Light Company, including the privileges secured to it by the ordinance of the city of Detroit, have been sold to satisfy the mortgage debt. The purchasers of the property organized a new corporation, pursuant to the provision of the statute of the State of Michigan in that behalf, by the name of the Mutual Gas Company. After the last named company had been for some time engaged in the manufacture of gas, and the distribution and sale of it in the city of Detroit, and in so doing had been using the street gas mains and pipes formerly the property of the Mutual Gas Light Company, the city of Detroit filed its bill of complaint in the Superior Court of the city against the company, to restrain it from such use of the streets, alleging, among other grounds for the relief asked, that the Mutual Gas Light

Company, through which the Mutual Gas Company derived whatever right it had to the streets in this respect, had forfeited those rights by the agreement of June 28th, and that the same had been canceled and revoked by the city through the repealing ordinance.

The Mutual Gas Company, by its answer, among other defenses, denied that the agreement between the Mutual Gas Light Company and the Detroit Gas Light Company of June 28th, constituted a breach of the provisions of the ordinance. The Superior Court dismissed the bill, and the city appealed to the Supreme Court, where the decree of the Superior Court was affirmed. The opinion of the court was given by Marston, Chief Justice, who, while holding that the agreement of June 28th constituted a violation of section two of the ordinance of the city, reached the conclusion that the city was not entitled to the relief prayed.

This case will be found reported in volume forty-three, Michigan Reports, 594. On page 607, the learned Chief Justice says: "The violation of such an agreement would not be a forfeiture of the consent given by the city, nor of the property of the corporation acquired thereunder."

Justice Cooley, on page 606, says: "I agree in the conclusion reached by the Chief Justice, while not agreeing in what he says about the division of territory between the two companies, being, in effect, a combination as to prices."

Following the opinion of Justice Cooley, the Reporter adds: "Graves and Campbell, JJ., concurred."

The judgment of the Supreme Court of the State of Michigan fully sustains the conclusion of the learned District Judge who granted the decree since appealed from. It is evident that Chief Justice Marston stood alone in the view taken in the opinion as to the effect of the agreement between the two companies, and that Justices Campbell and Graves concurred with Justice Cooley.

IX.

Upon the foregoing points and authorities we submit that the decree of the Circuit Court should be affirmed.

E. N. DICKERSON,
Of Counsel for the Plaintiff and Appellee.

OFFICE SUPREME COURT U.S.
FILED
OCT 5 1882

16-5-3

Supreme Court

OF THE UNITED STATES.

THOMPSON DEAN,
Complainant and Appellee,

vs.

THE CITY OF DETROIT,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN—IN EQUITY.

BRIEF FOR COMPLAINANT.

E. W. MEDDAUGH,
Solicitor for Complainant.

DETROIT:
FREE PRESS PRINTING HOUSE.
1882.

UNITED STATES OF AMERICA.

SUPREME COURT.

THOMPSON DEAN, *Complainant and appellee,* v. THE CITY OF DETROIT, *Defendant and appellant.*	*Appeal from the Circuit Court of the United States for the Eastern District of Michigan, in Equity.*

In the latter part of the year 1871, certain gentlemen who contemplated organizing a corporation for the manufacture and distribution of gas in the city of Detroit, applied to the Common Council of the city for leave to use the streets and alleys for laying gas conducting pipes.

The result was the passage of an ordinance granting the privilege on certain conditions, among which are the following:

1. "If it (the Gas Company) shall at any time enter into "any combination with any gas light company concerning "rates to be charged for gas, either to the city or private "consumers, then the consent given by this ordinance shall "cease;" "and the said corporation is hereby expressly for- "bidden to sell its property, franchises or privileges to any "other gas light company under a penalty of a forfeiture to "this city of its works," etc.

2. "It is further ordained that in all streets where the "said corporation has not laid mains or conductors within "two years from the passage of this ordinance, upon petition "of at least two applicants or occupants of buildings on "such streets for a supply of gas light, averaging two build- "ings in every two hundred feet of main pipe required to "supply the same, the company shall, when directed by the "Common Council, lay mains in such streets, the Common "Council ordering therein the usual proportion of lamp-post "service."

By express terms of the ordinance, the company was to forfeit all rights under it if it neglected to fulfill the obligations imposed; and it was required to file a bond in the penal sum of one hundred thousand dollars for the faithful performance of these obligations.

The corporation was afterwards organized under the name of the Mutual Gas Light Company of Detroit; and it executed and filed the bond required by the ordinance.

On the 15th day of March, A. D. 1872, the company had completed the construction of its works for the manufacture of gas, which were located in the township of Hamtramck, just beyond the easterly boundary of the city, and had laid gas conducting pipes from its manufactory into the city and through many of its chief streets and thoroughfares. The company thereupon commenced distributing and supplying gas to private consumers, and to the city corporation, and from that time continued to do so. During this time there have been several written contracts between the city and the company for the supply of gas by the latter, the last of which was dated the 14th day of August, A. D. 1877.

On the 28th day of June, 1877, the Mutual Gas Light Company and the Detroit Gas Light Company entered into an agreement, by which the former transferred to the latter all of its property situated westerly of the middle of Woodward avenue, and the latter transferred to

the former all of its property situated easterly thereof; the difference in the value of the property exchanged, some $140,000, being paid by the former to the latter company; and the former undertook not to lay mains or to supply gas westerly of the middle of Woodward avenue, and the latter made the like undertaking as to the territory easterly thereof, each, however, reserving the right to fulfill all legal obligations in that behalf resting upon it, coupled with a provision to the effect that all profits which either might make on gas supplied by it within the territory of the other should be paid to the company in whose territory it should be made.

On the 14th day of December, 1877, the Common Council passed an ordinance repealing its previous ordinance passed in behalf of the gas company, and recited in the act the following reasons for so doing:

1. That the company did not build its gas works in the city of Detroit, but in Hamtramck.

2. That the company entered into the agreement with the Detroit Gas Light Company for dividing the territory of Detroit between the two companies for gas supply, and

3. That the company had refused to lay mains in streets, "on petition of two applicants or occupants of buildings on such streets for a supply of gas light, averaging two buildings in every two hundred feet of main pipe required to supply the same," etc.

The controller of the city having been instructed by the repealing ordinance to take possession of the property of the company in the city of Detroit, on the 15th day of December, 1877, the bill of complaint in this case was filed, and a restraining order was thereupon made by the court.

The bill makes the following case:

First. The organization of the Mutual Gas Light Company for the purpose of manufacturing and selling gas for consumption within the city of Detroit, under the laws of the state in that behalf authorizing corporations thus formed to

lay pipes for conducting gas in streets, lanes and squares of the city, "under such reasonable regulations," as the city might prescribe.

Second. The application to the city of Detroit for such "reasonable regulations," and the making of the ordinance hereinbefore referred to.

Third. The execution by the company of the bond to the city, pursuant to the requirement of the ordinance.

Fourth. The construction by the company of its manufactory in Hamtramck, and its commencement to distribute gas to the city and its residents, about November 25th, 1872.

Fifth. That the company began at once to supply the city with gas, and subsequently made contracts with it for gas—the last one on the 14th day of August, 1877.

Sixth. That the company, in the construction of its works, etc., had expended its capital stock, and created in addition thereto, a mortgage debt of $650,000, and that the debt was represented by bonds of the company, which were held by different persons, complainant owning and holding over one hundred thousand dollars of them.

Seventh. That the Common Council had passed said ordinance of repeal, and that the city threatened to take possession of the property of the company, etc.

Eighth. That the reasons alleged for passing said ordinance of repeal were:

(*a*) The construction of the company's works for the manufacture of gas outside the corporate limits of the city.

(*b*) Neglect of the company to comply with the resolutions of the Common Council, passed from time to time, requiring it to lay mains in certain of the streets of the city.

(*c*) The agreement aforesaid entered into between the company and the Detroit Gas Light Company.

Ninth. That the company had in no instance neglected or refused to lay mains or conductors of gas in any street where application had been made on the terms named in the ordinance.

Tenth. That the ordinance did not render it obligatory on the company to locate its works for manufacturing gas within the city limits; but if it were otherwise, that the city is estopped by its dealings with the company from now alleging that as a ground of forfeiture.

Eleventh. That the agreement between the company and the Detroit Gas Light Company was not a breach of any of the conditions or obligations imposed upon the company by said ordinance; and that no other agreement had been made by the company with any other respecting gas rates to be charged, etc.

Twelfth. That the imposition of the several conditions, the alleged breach of which constitutes the grounds for passing the repeal ordinance, was beyond the charter powers of the city, and therefore they were not obligatory on the company.

Thirteenth. That complainant had requested the Mutual Gas Light Company to institute suit to restrain the city of Detroit from disturbing the company in its use of the privileges granted by the ordinance of 1871, etc., but that the company had declined so to do, and that he was holder and owner of more than two hundred thousand dollars of the capital stock of the company.

Fourteenth. Prayer for injunction, etc.

To the bill of complaint the city of Detroit pleaded.

1. That the Mutual Gas Light Company had not refused to bring suit, except collusively, and for the purpose of enabling complainant to make the averment of his bill in this behalf, and to give jurisdiction to this court, and

2. That complainant was not a mortgagee of the property of the company, but a holder of bonds merely, which were secured by a mortgage of the property of the company running to trustees, and that these trustees had not been requested and had not refused to bring suit, etc.

This plea and the averments of the bill respecting the subject matter of it, raise the mixed question, in this case, of law and fact, viz. :

Whether the court had jurisdiction.

As to the remainder of the bill of complaint, defendant answered, admitting its averments.

1st. As to the organization of the Mutual Gas Light Company.

2d. As to the provisions of the act authorizing such organization, respecting the use of streets, etc., of cities.

3rd. As to the purpose for which the company was organized, and the application to the Common Council for use of the streets, etc.

4th. As to the passage of the ordinance authorizing said company to use the streets, etc.

5th. As to the execution by the company of a bond, and its delivery to the city, pursuant to the requirement of the ordinance.

6th. As to the company's construction of its manufacturing works, the date when completed, and that the city was informed of the fact on the 10th of December, 1872.

7th. As to the company's beginning to manufacture gas and to supply the city and its residents with gas November 25th, 1872, and that it has ever since continued to supply them—the city itself, under various contracts, the latest of which was made August 14th, 1877, for one year—but denies that it was then known that the company had entered into the agreement with the Detroit Gas Light Company.

8th. As to the passage by the Common Council of the ordinance of repeal, and the reasons alleged in justification thereof.

All other averments of the bill are denied, and it is particularly insisted that the company has violated the ordinance of consent in the three following respects:

1st. In the construction of its manufactory in Hamtramck, instead of the city of Detroit.

2d. In not complying with the directions of the Common Council, given from time to time, to lay mains for conducting gas in certain streets within the terms and conditions in that behalf of the consenting ordinance.

3d. In that the company had made an agreement or combination with the Detroit Gas Light Company concerning rates to be charged for gas; and had, further, sold its property, franchises and privileges to the Detroit Gas Light Company; in short, had made the written agreement set forth in the bill of complaint.

The following questions arise on this record, to wit:

1st. Has the court jurisdiction?

2d. Was the location by the company of its gas manufacturing works in Hamtramck a violation of the consenting ordinance; and if it was, has not the city waived this requirement?

3d. Has the company neglected or refused in any case which was within the terms of the ordinance, to lay pipes for conducting gas in streets when properly directed by the Common Council so to do?

4th. Is the written agreement of June 28th, 1877, between the company and the Detroit Gas Light Company, a violation of the provision of the ordinance against entering into a contract concerning rates to be charged for gas, or the provision against a sale of its property, privileges or franchises to any other gas company?

5th. Are the several provisions of the ordinance respecting (a) The location by the company of its manufacturing works; (b) The price to be charged for gas; (c) A

combination by the company concerning rates to be charged for gas, and the sale of its property, to any other company; (d) The obligation of the company to lay mains in streets where ordered by the Common Council;—Such as were within the power of the Common Council to impose, or in any manner make obligatory on the company?

6th. Had the Common Council power to repeal the ordinance before there had been a judicial determination of the question as to the company's violation of its obligations?

I.

As to the jurisdiction of the court.

All the facts on which it depends appear in the evidence on behalf of complainant.

Mr. Fitch, the President of the Mutual Gas Light Company, and one of its directors, testifies:

That before the bill in this cause was filed, complainant made application to the Board of Directors for the company to institute suit, and that the Board refused.

A copy of the record of the Board's action, showing such refusal was put in evidence. (Record, p. 33.)

The testimony of the witness on cross-examination, on this point, appears from page 55 to page 66 of the Record. Its substance and effect are: That the complainant, Dean, and himself, and Meddaugh, composed the board of directors; that he and Dean together owned a majority of the stock of the company, and that complainant was its principal stockholder; that he and complainant were friends of many years standing, and had long held intimate business relations with each other; that the directors' meeting was held at complainant's suggestion, with whom the witness had talked about a suit by the company against the city, expressing his own opinion against it, on the ground that the local state

courts were prejudiced; that he had the impression that complainant preferred the federal court; that he would not have voted for a suit in the state court had he supposed complainant to prefer it; that he knew the result of the action of the Board would be to permit complainant to bring this suit, and personally he was glad of it; that Meddaugh & Driggs, who are complainant's solicitors in this cause, had been attorneys for the company; and on page 62 of the Record, in answer to the question, "Was there not an understanding, tacit or expressed, between the members of the Board of Directors, that the Board, as such, should refuse Mr. Dean's request to bring suit?" he says, "I don't know as there was any understanding of that kind, tacit or expressed; my impression was that the Board would; that I said before; I don't know what the other members of the Board thought about it; I am pretty well satisfied, so far as my impression is concerned, that Mr. Dean expected they would refuse it, because he knew that I had talked with Meddaugh." And again on the same page, in further explanation, he says, "I knew that Mr. Meddaugh was opposed to bringing any suit in the local courts, etc., etc., and Mr. Meddaugh and I being a majority of the Board, I had a pretty good idea of what a majority of the Board would do."

In reference to having a meeting of the Board and getting its action on the subject of bringing suit the witness said, that he did not think a board meeting necessary, having had some experience in these matters before; that his idea was that his refusal, as president of the company, to bring suit was sufficient; but that complainant wanted the action of the Board so that the refusal might appear of record. (Record, p. 64.)

I submit that in the most favorable aspect for the defendant of the testimony on this point, it establishes this state of facts: That complainant wanted suit brought to restrain the city's threatened action against the company; that he consulted the

president of the company about it, who expressed his opposition to it on the ground that the local state courts, in which the company alone could sue, were so biased against it that justice would not be had; that for this reason, and for the additional one that the president preferred the remedy by force, he declined; that he had conversed with the other director on the subject, and knew he concurred in this view, which fact he communicated to complainant; that complainant desired the refusal to be made matter of record, and so the meeting of the Board was called—all parties well knowing in advance what the result of the meeting would be—but without previous *agreement* as to what the Board would do.

This was such a refusal by the company to act as gave the complainant, or any other stockholder, the right to file a bill.

Pond v. The Vermont Valley Railway Co., 12 Blatchf., C. C. R., 281. In this case a bill was filed by stockholders of the defendant company to restrain the execution of a lease of the railroad to the Rutland Railroad Co. There were nominally two boards of directors in existence, the old and new Board, as they are respectively termed in the case. The old Board, it seemed, threatened to execute the lease. The bill averred the new Board to be the only lawfully constituted body, and that it had been requested to bring suit to restrain the old Board from executing the lease, which it declined to do. The board itself could not have sued in the United States Court.

Woodruff, J. (p. 293), speaking on the subject of the court's jurisdiction, says, "It cannot prevent or defeat the right of complainants to sue, if it be true that such directors refused to bring suit in order to drive the complainants to bring suit themselves for their own protection, etc.

"If the grounds of jurisdiction exist, the *motives which led thereto are not material.*"

See also Dodge v. Woolsey, 18 How., pp. 334-5-6.

Perdicaris v. The Charleston Gas Light Co. (10 Int. Rev. Rec., p. 110) holds that it is sufficient to authorize a bill by a stockholder, that the corporation has neglected to sue.

See also

Memphis v. Dean, 8 Wall, 64.
Newby v. Oregon Central R. R. Co., 1 Sawyer, 63.
Hotel Co. v. Wade, 95 U. S., 13.
Barney v. Baltimore City, 6 Wall, 280.
McDonald v. Smalley, 1 Peters, 620.

II.

The location of the manufacturing works of the company outside the city limits was not a violation of any provision of the ordinance.

It is undoubtedly the literal reading of the ordinance that the company shall build "gas works in the city of Detroit."

Sec. 2 of the Ordinance, Record, p. 7.

But this is not a substantive requirement. The objects of the section in which this language is found were to bind the company to be ready to supply gas in the city within a certain time, to prevent its being bought off from this purpose, and from entering into any combination concerning the rates to be charged for gas. It had no other. The question of whether the manufactory of the company should be located in Hamtramck, or the city, was evidently not thought of by either the Common Council or the company. The highest possible evidence of this is the fact that the company immediately commenced the construction of its works in Hamtramck, completing them in the month of November, 1872; that the company at that date, by a formal communication through its president to the Common Council, informed the city that the works had been constructed, and that the com-

pany was ready to distribute gas; that the company immediately entered upon its business of supplying gas to the city and its residents, and has continued this business without any objection or complaint from the city that its manufactory was in Hamtramck, until the repealing ordinance was passed in August, 1877.

This history amounts to a practical construction of the ordinance in favor of our position. In view of it, and of the lapse of so long a time, no court will construe the ordinance as requiring the location of the manufactory within the limits of the city.

Clark v. Mowyer, 5 Mich., p. 462 (Opinion of Christiancy, J.).

III.

The company has not refused or neglected to lay mains in any streets of the city of Detroit, where the conditions which are specified in section four of the ordinance, existed.

This point might safely be dismissed, with the statement that the averments of the answer, and the recital of the repealing ordinance in respect to it, are not only not sustained by the evidence, but, on the contrary, are expressly disproved. (Record, pp. 32, and from 43 to 51 inclusive.)

Giving to the provision in question the meaning which the former law advisers of the city gave to it, that is, that the company was bound to lay mains on streets having an average of one house to every one hundred feet of gas pipe required, there being the usual proportion of lamp posts on the street, whenever the common council should so order, there is no testimony to show a breach of this obligation by the company.

But what is the meaning of it?

The language is that "upon petition of at least two applicants or occupants of buildings on such streets, for a supply

of gas light, averaging two buildings on every two hundred feet of main pipe required to supply the same, the company shall, when directed by the Common Council, lay mains in such streets, the Common Council ordering the usual proportion of lamp-post service."

Without reference to practical results, and looking simply for the natural and ordinary meaning of the words here used, one would say, it is made the duty of the company to lay mains in streets of the city on the application for *gas light* of persons occupying buildings averaging one to each one hundred feet of pipe to be laid, provided the city should give the company the usual proportion of lamp posts to supply on the street. This is both the natural and grammatical reading of the provision. It is on the petition, etc., "for gas light," not merely for gas pipes on the street; and when the usual proportion of lamp-post service has been ordered, not when there are simply the usual number of lamp posts standing in the street, that the company is amenable to any order from the city.

The city's reading of the provision involves the following absurdities, viz.:

First. The city is to make an order on the company to lay gas pipes in streets irrespective of whether anybody there wants gas or will take it.

Second. The company is required to obey this order, although no human being on the street wants or will take its gas.

Third. The existence of two houses to every two hundred feet of pipe to be laid, although not one of them is so constructed as to permit the use of gas in them, and the occupants do not want and will not take gas, brings the street within the terms of the ordinance in this regard.

Fourth. The existence of lamp posts, or the city having ordered them, in the usual proportion on the street, although the company may never have the privilege of supplying gas

to them, authorizes the city to require the company to lay its mains there.

As well might the ordinance have required the laying of these mains in all streets on which there are two houses painted red, etc., the city ordering the usual width of sidewalk.

Is it not evident that the requirement that there should be two houses to every two hundred feet of pipe, and that the city should order the usual proportion of lamp-post service, was for the benefit and protection of the gas company? What other purpose could it have had?

IV.

The agreement of June 28th, 1877, between the Mutual Gas Light Company and the Detroit Gas Light Company was not a violation of any provision of the ordinance.

Section two of the ordinance attempts to prevent the company from "entering into any combination with any gas light company concerning rates to be charged for gas, either to the city or private consumers, and from selling its property, franchises or privileges to any other gas light company." (Record, p. 7.)

If it be conceded that the purpose of these two restrictions upon the company was the same, and that they both aimed at securing a lasting competition in the supply of gas within the city, it by no means follows that an act of the company which defeats this is necessarily a violation of the ordinance.

The express prohibition of one thing, either in a statute or contract, will not be held to include all other things which may be followed by the same consequences.

United States v. Isham, 17 Wall., 506.
Estate of Benjamin Ticknor, 13 Mich., 53.

It is very evident that this agreement is in no sense "a combination concerning rates to be charged for gas." There is not a word in it that expressly or by implication limits or qualifies the freedom of either party to it in this matter. A test of this is to consider whether the agreement would be violated if either company were to advance the price of gas beyond that asked by the other. It clearly would not.

The plain object was to prevent the company from an agreement with any other gas company as to the price at which gas should be sold, and it had no other.

To sustain the position that the agreement violates this clause of the ordinance, the broad proposition must be maintained that any combined action of this company with another which should affect the price of gas would violate it.

On this theory the ordinance has been continually violated, because the two companies have so dealt with each other as to inevitably reduce the price of gas to the lowest practicable sum, and that, too, with the certain knowledge of the Mutual Gas Light Company that this must be the result. And yet, strange to say, the Common Council took no hostile action, and the suffering citizen bore it all and took his gas at fifty cents a thousand without grumbling.

It is a combination *concerning* the price to be *charged* for gas, and not a combination that may *affect* the price of gas, that is prevented.

Suppose the two companies at any time had agreed to discontinue the employment of solicitors for custom, and that neither would disclose to the patrons of the other the price charged, the result would no doubt have been to affect the price of gas.

"The rates charged for gas" must be the subject matter of the agreement or combination, and it is not enough that these may, or even probably will, be affected by it as a consequence.

Nor is the provision against the company selling its property, franchises, etc., infringed by any of the terms of the agreement.

Literally, the company has, no doubt, sold property to another gas company. But it was not intended by this ordinance to prevent its selling to a gas company or to any other body, corporate or natural, such of its property as might not be required in its business.

Should it at any time have surplus material, metres, coal, or anything else, this ordinance was not designed to prevent the sale of it to the only body that would be at all likely to buy it, to wit, another gas company.

A prohibition against the sale of the whole is not violated by a sale of part.

Hasbrouck v. Paddock, 1 Barbour, 635.

The division of the city—the one company taking the east and the other the west—does not amount to a breach of the ordinance, for it is not one of the things prohibited, as it certainly would have been *in terms*, had the council so intended. Such a division was a most likely thing to occur, as must have been anticipated.

There is no provision in the ordinance requiring the company to extend its business over the entire city, or to supply gas otherwise than at the discretion of the company, unless the obligations to lay mains, etc., as required by section 4, may by implication require it in the cases there named.

So important a provision as this it cannot be assumed would have been overlooked had it been the design of the ordinance to impose on the company the duty of maintaining its business throughout the city.

In the absence of statutory or contract requirement, the company is at liberty to limit its business in the same manner as any merchant of the city might do.

This follows from the doctrine of the following cases:

Shepherd v. Milwaukee Gas Co., 6 Wis. R., 539.
People v. Manhattan Gas Light Co., 45 Barb. R., 138.
15 Wis. R., 318.
McCune v. Norwich Gas Co., 30 Conn. R., 521.
Commonwealth v. Lowell Gas Light Co., 12 Allen, 77.
Patterson Gas Light Co., v. Brady, 3 Dutcher (N. J.), 247.

The company then having the right to restrict its business, and having determined to do so by limiting it to that part of the city lying easterly of Woodward avenue, its property on the westerly side became surplus and subject to sale to any gas company wanting it.

The ordinance itself contemplates that competition as to price of gas will not continue, and it makes provision against excessive rates at such time.

Sec. 3 of Ordinance.
Record, p. 7.

Again, this provision was intended to accomplish the broader purpose of preventing the company from discontinuing its business in the city. There are many reasons why the continuance of the two gas companies should be desired aside from that of competition in the price of gas.

But by the terms of the agreement: "Each party * * * reserves to itself the right to perform, in any part of the city of Detroit, any acts or duties which it shall be * * * * legally bound or liable to do. (Record p. 26.)

Here is an express saving from operation of the agreement of all the company's duties to the city, or its citizens, respecting the supply of gas.

If therefore the purpose of these provisions of the

ordinance should be held to be, as has been contended, that all parts of the city, and all citizens, should have the opportunity of using the gas of this company, that right still exists intact as before the agreement was entered into.

And the same may be said respecting the claim that it was the purpose of these provisions to secure a continuing competition between the two companies. So far as a duty in this regard is imposed by the ordinance, it is not affected by the agreement.

The city has the same right to-day that it ever had to require the company to lay mains in any of the streets of the city, or to supply gas to the city or its citizens, westerly as well as easterly of Woodward avenue; and the company has the same duty upon it, and the same right, in respect to the laying of such mains and supplying gas as it had before the agreement was made.

The agreement has the effect to take away one of the motives that might otherwise have existed for the company to *voluntarily* lay its mains and supply gas westerly of Woodward avenue, to wit, the hope of profits on gas there distributed.

It will hardly do to stretch this ordinance to the extent of making it cover any agreement or combination the company might make with another gas company which should diminish its motives for extending its business; and yet to this must the city be driven to sustain its position.

Law makers and parties to contracts must be held to have expressed what they intended: In both, *things* are usually dealt with instead of *ideas* and *motives*. It will not do in construing a statute to hold that all things are authorized, required or prohibited, which are akin in their consequences or effects, to those enumerated. And so with contracts: What the parties desire to have done or omitted, must be in some way expressed.

The conclusion on this point must be, I think, that the agreement with the Detroit Gas Light Company does not violate the provisions of the ordinance—1st. Against the company's entering into a combination with another gas company concerning rates to be charged for gas. 2d. Against the company's selling "its property, franchises or privileges" to any other gas company.

V.

That part of the ordinance which imposes a forfeiture of the works, mains and other property of the corporation as the penalty for a sale of its property, franchises or privileges, is clearly in excess of the power of the council, and is void.

Charter of Detroit, p. 72.
Grand Rapids v. Hughes, 15 Mich., 54.
Phillips v. Allen, 41 Penna St., 481.
White v. Tallman, 2 Dutch., 67.

No authority to impose a forfeiture of property other than money is conferred by the charter of the city.

Charter, p. 72.

VI.

The several provisions of the ordinance which impose duties and obligations on the company, outside of those pertaining to the manner of using the streets and the condition in which the company should leave them after use, are void for the want of power in the city either to impose them or to stipulate for them.

The act under which this company was organized gives it "power to lay conductors for conducting gas through the streets, lands or squares," "with the consent of the munici-

pal authorities," "under such reasonable regulations as they may prescribe."

1 Comp. Laws, Mich., Sec. 2903. Record, p. 15.

"The law contemplates that permission will not be unreasonably refused or unreasonably burdened."

Maybury v. Mutual Gas Light Co., 38 Mich., 155.

There is no power here given to impose conditions or prescribe regulations respecting anything except the use of the streets, etc., for "laying conductors for conducting gas."

Again, the charter of Detroit, as amended by the act of April 17, 1871, sec. 2, which adds new sections 23 to 54 inclusive to the city charter, limits the authority of the Common Council. Sec. 27, added by that act, provides, that "Said Common Council shall have power * * * to control, prescribe and regulate the manner in which the highways, streets * * * within said city shall be used and enjoyed."

This view is strengthened by reference to the provisions of the Street Railway act.

1 Comp. Laws, Mich., p. 830.

Section 13 of the last named act requires that the railway company shall obtain "consent of the corporate authorities of a city, etc., by an ordinance, etc., etc., and under such rules, regulations and conditions as in and by such ordinance, etc., shall be prescribed," before laying its road.

The phraseology here used is more comprehensive than the corresponding provisions of the Gas act, and yet the Legislature assumed that it would not authorize the city to prescribe or contract as to the rate of fare that should be charged for the transportation of passengers. By section 20 of the act this power is expressly conferred.

The case of *The People v. Brown* (30 Barb., 24) was a *quo warranto* against defendants for assuming to be a corporation. It was alleged against the validity of the charter, among other things, that it authorized the legislative body of the city of New York to confer on the corporation "the exclusive right of making or selling gas, etc."

The charter provided that no public street, avenue, etc., should be dug into, etc., without consent of the Common Council of the city first obtained, and then added, "and the said boards (the Common Council) are hereby authorized to grant and vest exclusive permission and authority to and in said company for said purpose, to such an extent, and under such regulations as to them shall seem expedient."

Held, That the authority here conferred on the city related simply to the laying of pipes, etc., in the streets of a city, and to digging into them for that purpose.

The powers of a municipal corporation must be found in its charter or an act of the Legislature, either in express grant, or as incident to a grant.

Hodges v. The City of Buffalo, 2 Denio R., 110.

Halsted v. The Mayor, etc., of New York, 3 Comstock, 430.

1 Dillon on Municipal Corporations, p. 55.

This is elementary law.

It is as true in respect to the power to contract as to any other power.

1 Dillon on Municipal Corporations, p. 371.

The charter of the city of Detroit enumerates the powers of the city, and contains no general terms of grant, such as "the power to do any other things needful to the welfare of its citizens."

The usual grant of sanitary and police powers of a city carry a large class of incidental powers, such as that of providing or contracting for water supply to the city, etc.

The Supreme Court of the state of Ohio, in *The State v. The Cincinnati Gas Light Company*, 18 Ohio St., 295, speaking of the power of the city of Cincinnati to pass an ordinance conferring certain privileges on the gas company, says: "It must be found in the statute book in express terms, or arise from the terms of the statute by implication so direct and necessary as to render it clear."

There was in this case, power given to the council by a legislative act, to cause the city to be lighted with oil or gas. The council made a contract conferring on the Gas Light Company certain exclusive rights in the use of the streets. On page 295 the court says:

"The authority to make the contract must be found, if at all, in the general grant of power to cause the city to be lighted with oil or gas."

The usual grant to cities to regulate streets, improve them, etc., will not authorize them to consent to the use of a street for a railway.

2 Dillon on Municipal Corporations, p. 553.
G. R. & I. R. R. Co. v. Haisel, 38 Mich., 67.

It is very questionable whether the Legislature of Michigan, under the Constitution of the state, can confer upon municipal corporations power of the kind now under consideration.

By the Constitution of this state, only powers of a local legislative and administrative character can be conferred on cities.

Const. of Mich., art. iv, sec. 88.

I should seriously question whether the regulation of the price to be charged for light made of any material, is within the sphere of government as limited in this country. If the price to be charged for light, why not for heat; if for gas, why not for candles, and oil? And why not also for wood and coal? Heat is quite as essential to the public

good—more essential to comfort and health during half the year in this latitude—as light.

The equitable rule that estops one from repudiating part of a contract while holding the fruits of the other parts of it, does not apply here.

The ordinance in question is only a contract in so far as its provisions and requirements are within the power of the city to make. As to all others, neither is bound, for as the city might repudiate them, it follows that the company may also.

VII.

The council had no power to repeal the ordinance until after a judicial determination of the question of the company's breach of its conditions, etc.

In the case of the *Flint & Fentonville Plank Road Company v. Woodford*, 25 Mich., 99, the Supreme Court of this state expressly so held respecting the power of the legislature to repeal the charter of the company.

The reasoning of the court in that case is equally applicable to the facts of this, and would seem to be conclusive. The gist of it is that the repeal involves a judicial act, to wit, that of determining the question of violation of the contract by the other party, and the power of determining such question does not belong to the legislative department.

The case of *The Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barr. R., 369, fully sustuins this position. See particularly pages 365–6 and 7.

The case of the *Pacific Railroad Co. v. Leavenworth* (1 Dillon, C. C. R., 393), will no doubt be cited by opposing counsel to sustain the action of the city in passing this repealing ordinance. It will be observed that the question of the power of the City Council to do this before a judicial ascertainment of the forfeiture was not raised.

As this case may also be used as authority for the city's claim of the right to require or agree for the conditions and stipulations of the ordinance respecting the price to be charged for gas, I desire to call attention to its facts and to give just what is determined by it.

The case arose on a bill filed by the company to restrain the city of Leavenworth from taking up the track of the complainant, which had been laid in the streets of the city, under authority of an ordinance of the city passed for that purpose.

The assent of the corporate authority of a city is by the statute of Kansas made necessary before a railway company should lay its track in the streets. The assent in this case was given by the city in the form of an ordinance which prescribed the *manner in which the company should keep and maintain the street*, or some part of it, and also that the company should construct and maintain between certain streets named, and within a time limited, "all of the freight and passenger depots used and required for the transaction of the business of said company in said city." The ordinance further provided that if the company failed to fulfill any of the obligations imposed by the ordinance the city might enter upon and "resume possession of all the public grounds of the city on which said company shall have constructed its road by virtue of this grant."

The railroad company laid its track in the streets of the city, but failed to comply with the conditions.

The city repealed the ordinance and instructed the City Marshal to take possession of the public grounds of the city on which the track of the company had been laid.

The railroad company brought this bill for an injunction.

It was argued by counsel for the motion that the conditions imposed by the city were in excess of its power.

On page 305 the Judge says:

"In the case before me the work which the company

agreed to do in consideration of the right of way granted, seems to be upon or connected with the streets occupied, and there is nothing in the record to show more was required of the company than was reasonable under the circumstances, etc."

The conditions of the grant here had relation to the streets occupied. In our case the conditions are entirely foreign to the privileges asked and authorized by the statute to be granted.

The two cases would have been parallel had the city of Leavenworth made the grant on condition that the railroad company should forever thereafter transport its citizens and carry freight for them at a fixed named rate.

And so as to the case of *The Northern Central R. R. Co. v. The Mayor, etc., of Baltimore*, 21 Maryland R., 93, which was a bill in chancery by the city of Baltimore, to restrain the railway company from constructing or laying a railroad in the streets of the city. By special act the Legislature of Maryland authorized the company to build a branch road, but before such road should be constructed in the city limits the required consent of the Mayor, etc. An ordinance was framed giving consent, but on conditions respecting the grading, etc., of the streets, the rate of speed of the cars in the city, and other like conditions.

The company disregarding the conditions as to grade of streets, proceeded to construct its road; hence a bill for injunction.

The injunction was granted and the Supreme Court sustained it.

I have no quarrel with the decision, or the reasoning on which it goes. Both seem to me entirely sound. There is nothing in either to sustain the position of Detroit in our case.

All of the conditions here imposed are pertinent to the grant.

VIII.

If it be contended, and the court shall hold, that the powers of the Common Council in respect to this class of matters are akin to, and carry all the rights and incidents of, like powers of individuals, then I insist that there has been a complete waiver by the city of all objections of the character set up in the answer.

The city must submit to occupy one of two positions in this relation—either the governmental or the proprietary; if the latter, then it is liable to all the consequences of a natural person under like circumstances.

There can be no doubt that a natural person standing in such a contract relation to this company, who should continue to treat the contract as subsisting by accepting the benefit of acts in its performance, subsequent to the violations complained of, would be held to have waived the objection—condoned the fault.

The agreement between the two gas companies was executed June 28th, 1877. The record shows that the three daily papers of the city repeatedly published the fact before the following August. On the 14th day of August the city entered into a contract, in writing, with the gas company for supplying its lamp posts easterly of Woodward avenue, and the Central Market, with gas for the period of one year.

It cannot be successfully contended that the city when making this contract did not know of the violations of the ordinance now complained, with three newspapers, all having a general circulation in the city, announcing the fact several times. This knowledge, in the absence of all evidence to the contrary, will be presumed.

On the point of waiver, see the reasoning in the *Brooklyn R. R. Co.*, 32 Barb., above cited.

IX.

Since the decree of the Circuit Court in this cause was made, the mortgage foreclosure proceedings mentioned in the Bill of Complaint, have been prosecuted to completion, and all the property, franchises and privileges of the Mutual Gas Light Company, including the privileges secured to it by the ordinance of the city of Detroit have been sold to satisfy the mortgage debt. The purchasers of the property organized a new corporation, pursuant to the provision of the statute of the State of Michigan in that behalf, by the name of the Mutual Gas Company. After the last named company had been for some time engaged in the manufacture of gas, and the distribution and sale of it in the city of Detroit, and in so doing had been using the street gas mains and pipes formerly the property of the Mutual Gas Light Company, the city of Detroit filed its Bill of Complaint in the Superior Court of the city against the company, to restrain it from such use of the streets, alleging, among other grounds for the relief asked, that the Mutual Gas Light Company, through which the Mutual Gas Company derived whatever right it had to the streets in this respect, had forfeited those rights by the agreement of June 28th, and that the same had been cancelled and revoked by the city through the repealing ordinance.

The Mutual Gas Company, by its answer, among other defenses, denied that the agreement between the Mutual Gas Light Company and the Detroit Gas Light Company of June 28th, constituted a breach of the provisions of the ordinance. The Superior Court dismissed the bill, and the city appealed to the Supreme Court, where the decree of the Superior Court was affirmed. The opinion of the court was given by Marston, Chief Justice, who, while holding that the agreement of June 28th constituted a violation of section two of the

ordinance of the city, reached the conclusion that the city was not entitled to the relief prayed.

This case will be found reported in volume forty-three, Michigan Reports, 594. On page 607, the learned Chief Justice says: "The violation of such an agreement would not be a forfeiture of the consent given by the city, nor of the property of the corporation acquired thereunder."

Justice Cooley, on page 606, says: "I agree in the conclusion reached by the Chief Justice, while not agreeing in what he says about the division of territory between the two companies, being, in effect, a combination as to prices."

Following the opinion of Justice Cooley, the Reporter adds: "Graves and Campbell, JJ., concurred."

This judgment of the Supreme Court of the State of Michigan fully sustains the conclusion of the learned district judge who granted the decree since appealed from. It is evident that Chief Justice Marston stood alone in the view taken in the opinion as to the effect of the agreement between the two companies, and that Justices Campbell and Graves concurred with Justice Cooley.

I submit that the decree of the court below should be affirmed.

E. W. MEDDAUGH,
Solicitor for Complainant and Appellee.